IN THE

Supreme Court of the United States

October Term, 1946

No. 1239

S. L. HURT,

Petitioner,

versus

COTTON STATES FERTILIZER COMPANY *et al.*,

Respondents,

(District Court No. 301)

S. L. HURT,

Petitioner,

versus

COTTON STATES FERTILIZER COMPANY *et al.*,

Respondents.

(District Court No. 316)

S. L. HURT *et al.*,

Petitioner,

versus

FRAMPTON E. ELLIS, as Administrator de Bonis Non Cum Testamento Annexo of the Estate of Joel Hurt, Sr., Deceased, *et al.*,

Respondents.

(District Court No. 324)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MURRAY C. BERNAYS,
Counsel for Petitioner.

JOHN L. WESTMORELAND,
of Atlanta, Georgia,
of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT[1]

Your petitioner, S. L. Hurt, respectfully prays that a writ of certiorari issue to review the judgment of the

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[1] It is believed that the argument in support of the petitioner's contentions is sufficiently set out in the Reasons Relied on for Granting the Writ, pp. 20 to 31, *infra*. Accordingly, no separate brief is being filed.

Circuit Court of Appeals for the Fifth Circuit rendered January 3, 1947 (R. 2602, v. V), which affirmed and remanded with directions the judgment of the District Court in No. 301 dismissing your petitioner's complaint on the merits (R. 1955, v. III), affirmed the judgment in No. 316 dismissing your petitioner's complaint upon the merits (R. 2055, v. IV), and affirmed the judgment in No. 324 against your petitioner and in favor of the respondents Ellis and Mrs. Willie Martin Hurt as prayed in said respondents' complaint (R. 2551, 2555, v. V).

No. 301 is a derivative stockholder's suit. It was brought by petitioner as beneficial owner under his late father's Will, and as legal owner through subsequent purchase, of shares of stock of Cotton States Fertilizer Company, a Georgia corporation. Petitioner's status to sue was established on a prior appeal.[2]

No. 316 is a similar suit by petitioner as owner by purchase of further shares of the company.

No. 324 is a suit by respondent Ellis as administrator *de bonis non c.t.a.* of the decedent estate referred to above, and respondent Willie Martin Hurt as an alleged creditor of the said estate, as co-plaintiffs, against petitioner as defendant, for a determination that Ellis, as administrator, is owner of the shares of preferred stock claimed by petitioner in No. 301, and that the co-plaintiff, Willie Martin Hurt, is a creditor of the said estate to such an amount that petitioner has no equity in the said shares and is, therefore, without status to sue.

The writ is sought as against all the respondents, except Messrs. Bloch and Hall in No. 316.

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[2] *Hurt* v. *Cotton States Fertilizer Company*, 145 F. 2d, 293, *cert. den.* 324 U. S. 844.

Jurisdiction

The judgment of the Circuit Court of Appeals was rendered January 3, 1947. Rehearing was denied by order entered January 31, 1947 (R. 2611, v. V). The jurisdiction of the District Court is founded on diverse citizenship. The jurisdiction of this Court rests upon §240(a) of the Judicial Code as amended by the Act of February 13, 1925 [Title 28 U. S. C. §347(a)].

Opinions Below

The opinion of the Circuit Court of Appeals is reported in 159 F. 2d 52 (also printed R. 2588, v. V). Its opinion on a prior appeal in No. 301 is reported in 145 F. 2d 293, cert. den. 324 U. S. 844. The District Court rendered no opinion upon either occasion. Its Findings and Conclusions in No. 301 appear at R. 1930, v. III; in No. 316 at R. 2052, v. IV; and in No. 324 at R. 2537, v. V.

Questions Presented

1. Whether, in a diversity jurisdiction suit, the Federal courts in Georgia were free to decide without reference to Georgia law that there was nothing illegal, fraudulent, or otherwise exceptionable in the following transactions between Cotton States Fertilizer Company, a Georgia corporation, and certain of its officers and directors:

a. **A transaction in which the three officers and** directors of Cotton States caused the corporation to satisfy $49,102.68 of undisputed debts owing to it by one of the directors and a company in which he was interested, upon payment of a part of the consideration to Cotton States and a part of it to the other two directors—it being undisputed that the two directors to whom the part was diverted paid Cotton States nothing for it?

b. A transaction in which the officers and directors of Cotton States caused the company to satisfy $18,352.75 of undisputed indebtedness owing to it by one of the directors, in consideration of his surrendering to Cotton States shares of its common stock at a time when the company was admittedly insolvent and the said shares were worthless?

c. A transaction, carried out at a time when Cotton States was solvent and prospering and its stock was valuable, in which two of the company's officers and directors purchased on its behalf debts owing by it together with shares of its common and preferred stock, but so manipulated the transaction that for $15.22 they got secretly and still retain the stock thus purchased, which included the controlling common stock (607⅔ shares out of 1035⅓ issued and outstanding)?

d. A course of practice over a period of years under which Cotton States' officers and directors used up the company's distributable profit by paying it to themselves as salary increases and bonuses?

2. Whether, in such a suit, the Federal courts in Georgia were free to decide without reference to Georgia law that recovery is barred by reason of a showing that the representative of the injured shareholders was given, from time to time, such information that if he had caused it to be analyzed by counsel and accountants he might have been put upon inquiry sooner regarding the transactions in suit?

3. Whether, in such a suit, the Federal courts in Georgia were free to decide without reference to Georgia law that a financial agreement between husband and wife, residents of Georgia, by virtue of which the wife, who did not want a divorce, took such steps and proceedings that

she got one, is valid, and that the executory portion of such agreement is enforcible?

Statutes Involved

Pertinent provisions of the Georgia Codes of 1910 and 1933 are set out in the Appendix hereto, pp. 32-5, *infra*.

Summary Statement

Status of Parties: Joel Hurt, Sr. died in 1926, owning directly and through Atlanta Realty Corporation the controlling stock (2650 shares of common out of 3000 shares issued and outstanding) of Cotton States Fertilizer Company, a Georgia corporation. Other members of the Hurt family owned 300 shares more. Mr. Hurt's residuary estate, which included the controlling stock, was bequeathed in sixths to his widow, three sons and two daughters, "to be divided between them in kind, as far as may be practicable" (R. 224, v. I). The sons were Joel, Jr., who was one of the executors under the Will; Sherwood L., the petitioner herein; and George F., since deceased.

It is conceded that with respect to the transactions in suit Joel, Jr. acted for the executors of the estate and as the representative of his kin who owned the minority stock. In our further discussion we shall disregard Atlanta Realty Corporation's technical title, and treat the controlling shares as belonging to the decedent estate; also, we shall refer to the estate and the said minority stockholders collectively as "the vendors."

Respondent Clay had been with Cotton States since 1915 and its manager since 1920 (R. 107, v. I; R. 733, v. II). In 1926 he was also Secretary and Treasurer.

He enjoyed the trust and confidence of the decedent and his family. Shortly after Mr. Hurt's death he got the vendors to sell him their 2,950 shares on a down payment and a series of promissory notes secured by a pledge of the stock, none of the stock being deliverable until the purchase price had been paid in full. Respondent Howell was co-purchaser with Clay and financed the initial payment (R. 738, v. II), but he assumed no obligation to the vendors for the payment of the unpaid balance.

In 1927 Clay represented to the vendors that he could not meet the agreed instalments, and told them that he had gotten Thompson to come in on the purchase with him (R. 741, v. II; Defts. Ex. 65, R. 1343, v. II). The transaction was rearranged to provide for shares of the stock to be released from the pledge in proportion to the payments made and to be made; and new notes were given for the unpaid balance by Clay and Thompson, the latter acting through one of his companies, Niagara Sprayer Company (R. 743, v. II). Howell dropped out of the deal, except to the extent set out below.

Clay became a director of Cotton States in July, 1923, and President in May, 1926. He has held those offices and has been the active head of the business continuously since. Howell was Secretary and a director from May, 1926 to August, 1932. Thompson was an officer and director from November, 1927 to April, 1943, and Managing Director from September 28, 1940, to June 30, 1941.[3] He was a New York lawyer with an active practice, and in 1932 he delegated to the respondent O'Shaughnessey, as his confidential agent, an active part in the management of his interests in Cotton States and others of his enterprises. O'Shaughnessey became a director of Cotton States in August, 1932, and Treasurer in July, 1933, and

[3] Thompson was not found in the jurisdiction and is not a party to the suit.

has held those offices continuously since (R. 1949-50, v. III; R. 805-6, 925-8, v. II).

In 1932, as a result of the Howell transaction set out below, the vendors surrendered their unpaid notes and such common stock as still remained pledged to them, and accepted in exchange therefor 962 shares of Cotton States preferred, par value $100 per share, of which 884 1/5 shares went to the estate and the balance to the other vendors. In 1934, in connection with the Clay transaction set out below, the vendors wrote down their preferred stockholdings almost in half, the estate getting 495.1 shares and the other vendors 43.6. In 1943 the petitioner called upon his brother Joel, as sole surviving executor of their late father's estate, to bring a stockholder's derivative action to rectify the matters complained of herein, but, for lack of funds in the estate to finance such suit, Joel refused. Thereupon, on December 10, 1943, the petitioner bought the said 495.1 shares of preferred stock from the estate and the other 43.6 shares from the other holders.

No. 301 was filed June 14, 1944; dismissal for lack of status to sue was reversed in November, 1944, and rehearing was denied December 13, 1944. While the appeal in No. 301 was pending, and on August 17, 1944, the petitioner filed his complaint in No. 316. The history of No. 324 is as follows: On April 20, 1944 the petitioner made demand upon Cotton States to transfer the 495.1 shares of preferred into his name as record owner, but Cotton States refused. Four days later Joel, Jr. was removed as executor; on June 5 respondent Ellis was appointed administrator *de bonis non c.t.a.;* and on October 18 Ellis joined with respondent Mrs. Willie Martin Hurt in their complaint in the State Court in No. 324. The suit having been removed to the United States District Court, all three cases were tried as one and heard on appeal in the same way.

Howell Transaction [Question 1*a* of "Questions Presented"]: In 1932 Clay was financially embarrassed. Thompson was in a bad way too, so much so that he sent O'Shaughnessey to Georgia to try to raise money for him, with instructions that it did not matter what happened to Cotton States if only the desired money could be found (R. 925, 927, v. II). Clay considered having Cotton States issue to him bonds and preferred stock for use in satisfying his debt to the vendors, but was advised that he would have to pay value to the company for the bonds (Defts. Exs. 70, R. 1347, and 58, R. 1330, v. II). Instead, Clay and Thompson prevailed upon the vendors to agree to accept for their unpaid notes preferred stock of Cotton States to be thereafter lawfully authorized and issued (R. 758, 1111-12, v. II).

The position at this time was as follows: Clay, Thompson and Howell were the company's sole officers and directors. They owned 993⅓ shares each of Cotton States' outstanding 3,000 shares of common, par value $100 per share. A part of this stock was still pledged to secure the unpaid balance of $96,200 (in round figures) which Clay and Thompson owed the vendors. Howell and Planters Seed & Drug Company, a company in which Howell was interested, owed Cotton States $49,051.58.

Clay, Thompson and Howell thereupon did the following:

At a stockholders' meeting held July 19, 1932 (Pltfs. Ex. 15, R. 1109-14, v. II) amendments to the charter were voted, to authorize (a) issuance of $100,000 par value preferred, (b) conversion of 1,000 shares of common, share for share, into preferred, and (c) acceptance by the corporation of its stock in payment of debts owing to it. Also, a resolution was adopted that "the corporation accept from S. F. Howell, 494 shares of common stock now standing in his name and owned by him, and 333⅓ shares of preferred stock as soon as it shall have been converted from common to preferred, in full payment of his indebt-

edness and that of Planters Seed & Drug Company to this company, amounting to the sum set forth in contract with him of this date." However, the contract with Howell "of this date" does not appear in the minutes. It released Howell and Planters Company in consideration of Howell's agreement to transfer to Cotton States 827⅓ shares of its common owned by him, or, at the option of Cotton States, such of the said common shares as would remain after conversion of 333⅓ of them by Howell into preferred stock (R. 42, v. I). Thereafter, the Cotton States charter having been amended as set forth above, Cotton States accommodatingly "elected" to receive from Howell in payment of his and Planters Company's debts, instead of the 827⅓ shares of common, only such shares of common as remained after Howell had converted 333⅓ shares into a like number of shares of the newly authorized preferred (Pltfs. Ex. D-3, R. 259, v. I; Defts. Ex. 180, R. 1533, v. III).[4] These 333⅓ shares of preferred were issued to Howell, and he then divided them, 320⅔ going to Clay and Thompson, who paid Cotton States nothing for them, and the remaining 12⅔ to Cotton States. Clay and Thompson each added to these 320⅔ shares an equal number of shares of preferred which they had respectively procured by conversions of the necessary shares of their own common, and transferred the total of 962 preferred shares which they had thus put together to the vendors, in payment of their $96,200 debt (stub of Pltfs. Ex. D-4, R. 261, v. I, showing the source of the 884 1/5 shares that went to the estate; also Defts. Ex. 179, R. 1532, v. III).

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[4] Defts. Ex. 180 is Cotton States' receipt to Howell for 547⅓ shares of common in full settlement of his and Planters Company's debts. We have not been able to find in the record any explanation for the difference of 53⅓ shares between the 494 mentioned in the minutes of the stockholders' meeting, R. 1109-14, and the 547⅓ receipted for.

Through this device Howell and his company got released; Clay and Thompson paid off the vendors in substantial part with property of Cotton States which had cost them nothing, and got their shares of common released from the pledge; and Clay and Thompson ended up owning practically all the common stock of Cotton States instead of only two-thirds.

Clay Transaction [Question 1*b* under "Questions Presented"]: In 1933 Clay had overdrawn his account with the company to the extent of $17,509.11. At a meeting of the board held July 22, 1933 (Pltfs. Ex. 15, R. 1125, v. II), Clay being present and voting, the treasurer was authorized to accept from Clay 338 shares of the company's common stock in full settlement of the debt. A year later this had not yet been carried out, and Clay's debt had risen to $18,352.75. At a meeting of the board held July 21, 1934 (Pltfs. Ex. 15, R. 1136, v. II), Clay being again present and voting, the increased indebtedness was directed to be satisfied for the same consideration; and this time the transaction was carried out. Cotton States was admittedly bankrupt (R. 1013, v. II), and the stock was worthless. Clay's explanation for the delay (R. 817, v. II) was a plain admission that during this interval he was, in effect, "playing the market" against his company.[5]

In justification it was testified that in 1934 Cotton States was applying for an RFC loan, and that the Atlanta agency manager of the RFC advised the company "to charge off anything that was worthless and make the application based wholly on sound assets" (R. 1013, v. II). However, the possibility of applying for such a loan

[5] The following was his explanation: "Well, I guess I was too optimistic. I was thinking all the time maybe this depression would stop and things would turn out better, and I really thought there was a chance of conditions improving and I really preferred to hold the stock and try to work the thing out, but they didn't. There was no change in conditions. So, when we began to clean out in June of 1934, I thought the best thing to do was to go ahead and charge it off."

was not considered until May, 1934 (R. 932, v. II; Pltfs. Ex. 7, R. 33, v. I). Furthermore, what the RFC was after could have been perfectly well, and properly, accomplished by setting up against Clay's indebtedness a reserve which would value it down on the books to whatever figure the board might consider reasonable, and in due time Clay could have paid off what he owed—if he was interested in dealing fairly with the company. Certainly the RFC was not conditioning its loan to Cotton States on the company making a gift of this debt to its president and director.

Thompson Transaction [Question 1*c* under "Questions Presented"]: In 1942-3 Cotton States was showing substantial profits and its prospects were good. The directors decided that the company should try to buy up certain obligations of long standing (R. 938-49, 990-1, v. II). They included trade debts; notes owing to Thompson, amounting (with interest to April 30, 1943) to $18,866.55; and an unpaid item of $2,500 salary to Thompson. As at April 30, 1943, these purchases had been accomplished. Clay and O'Shaughnessey bought up the claims personally, but did so, on their own testimony, in the company's behalf. Their purchase from Thompson comprised, in a single transaction, acquisition of his notes, his salary claim, and his Cotton States stock (7.1 shares preferred and 607⅔ shares common). At the trial Clay and O'Shaughnessey claimed that they paid Thompson $27,500 for the above.

Clay and O'Shaughnessey then proceeded, however, to treat their purchases as though they had been made for personal account. Certain selected obligations acquired by them they set up on the company's books as obligations owing to themselves—not in the amount which they claimed to have paid for them, which was $25,474.86, but in their full amount, both principal and interest, as at April 30, 1943, *viz.*, $55,934.82 (Pltfs. Ex. 1, R. 1026, v. II, item: "Notes Payable: For Money Borrowed from Indi-

viduals * * * $55,934.82"; and see Pltfs. Ex. 15, R. 1187, v. II). That left unaccounted for Thompson's $2,500 salary claim, and his stock. The salary claim was washed out as described at R. 947-8, v. II, by having Cotton States pay it back to Clay and O'Shaughnessey at once. The stock Clay and O'Shaughnessey simply took over, each taking half the common (R. 1039, v. II). The above set-up, recorded in completely blind entries on the books as at June 30, 1943, was continued on the books as at June 30, 1944 (Pltfs. Ex. 2, R. 1067-8, v. II).

But the Circuit Court of Appeals having sustained petitioner's status to sue in November, 1944, and rehearing having been denied December 13, 1944, Clay and O'Shaughnessey created the minutes of December 30, 1944 (Pltfs. Ex. 15, R. 1183-92, v. II). These purport to explain and justify the blind entries in the 1943 and 1944 accounts regarding "money borrowed from individuals." To that end the minutes set out an accounting which indicated that Clay and O'Shaughnessey had bought for $25,474.86 obligations of the company totaling as at April 30, 1943 the above sum of $55,934.82. The minutes then go on to provide that Cotton States shall buy back these obligations from Clay and O'Shaughnessey at the April 30, 1943 cost to them of $25,474.86 plus interest to December 30, 1944, aggregating the sum of $28,022.35, Clay and O'Shaughnessey on their part agreeing to lend back $28,000 to the company at 5%. Once again, the shares of stock acquired from Thompson are omitted from the accounting.

The claim now made by Clay and O'Shaughnessey that they paid Thompson $27,500 for his notes, accounts, and shares of stock is not true. Under date June 9, 1943 Clay wrote Joel Hurt (Pltfs. Ex. 13, R. 53, v. I): "Mr. Thompson sold his common stock, along with his notes and accounts which the Company owed him, for a lump sum which amounted to less than the face value of the notes and accounts plus accrued interest. It was for this

reason that I said in my previous letter that he received very little, if anything, for his common stock." Clay stood on the truth of this statement at the trial (R. 383, v. I). But Thompson's notes and accounts, plus interest, amounted to only $21,366.55 ($18,866.55 at R. 1187, where the items are wrongly totaled at $18,852.33, plus the $2,500 salary claim). Clay and O'Shaughnessey thus got Thompson's stock for practically nothing, as appears from the following, where we have set up the transaction using both the amounts which respondents now claim they paid, and the figures confessed in Clay's June 9 letter:

From Whom Purchased (R. 1187 plus testimony at R. 938-49 and 990-1)	*Total Purchased*	*Am'ts. Claimed to Have Been Paid*	*Am'ts. Actually Paid* (per trial testimony and June 9 letter re Thompson deal)	
Am. Cyanamid	$22,228.76	$100.00	$100.00	
Niagara Sprayer	9,050.00	1,250.00	1,250.00	
Baker	516.98	1.00	1.00	
Thompson	18,866.55[6]	25,000.00 } [8]		
	2,500.00[7]	2,500.00 }	21,366.55	minus[9]
Clay	4,901.00	4,901.00	4,901.00	
O'Shaughnessey	371.53	371.53	371.53	
Totals:	$58,434.82	$34,123.53	$27,990.08	
Less am't repaid to Clay and O'S		27,974.86[10]	27,974.86[10]	
Cost of Thompson stock to Clay and O'S		$6,148.67	$15.22	

[6] Reflected at R. 1187, v. II.

[7] Not reflected at R. 1187.

[8] Total of $27,500 which Clay and O'Shaughnessey now claim they paid Thompson.

[9] See quotation from Clay's June 9 letter, *supra*.

[10] $2,500 paid back by Cotton States to Clay and O'Shaughnessey at the time of the purchase from Thompson (R. 948, v. II), plus $25,474.86 thereafter repaid to them (R. 1189, v. II).

Disregarding the preferred shares, Clay and O'Shaughnessey thus made a secret purchase, at the price of 2½ cents per share, of more than 60% of all the outstanding Cotton States common. The company had at June 30, 1943, total assets of $300,946.69, and net worth of $172,636.55. In the very year in which the purchase was made the company's net profit was $44,550.75 (Pltfs. Ex. 1, R. 1016-7, v. II); and in point of fact the company was worth substantially more than is set out above, because liabilities were inflated by improper salary accumulations for officers as set out in the next part of our discussion. These very accumulations furnished, in large part, the money with which Clay and O'Shaughnessey bought out Thompson (R. 1022, v. II; R. 949, v. II).

Salaries and Bonuses [Question 1*d* under "Questions Presented"]: At a meeting of the directors held August 2, 1932 (Pltfs. Ex. 15, R. 1116, v. II), Clay's salary was reduced from $6,000 per year to $3,000, by reason of the company's straitened condition. At a meeting of the board held January 2, 1934 (Pltfs. Ex. 15, R. 1127, v. II) O'Shaughnessey was voted compensation at the rate of $2,600 per year.

In 1934, upon the precise ground that the company was in bad shape and that all parties in interest must make sacrifices (R. 33, v. I), Clay, Thompson and O'Shaughnessey prevailed upon the vendors (now preferred stockholders) to write down their stock by substantially one-half (Pltfs. Ex. 15, R. 1149-51, v. II). "I am confident," Clay wrote Joel Hurt, that an appropriate rearrangement of the stock "would enable us to obtain a RFC loan" (R. 34, v. I). However, hardly had the RFC loan been closed when Clay's salary was restored retroactively to the $6,000 figure, and O'Shaughnessey's raised retroactively to $4,800 (cf. Pltfs. Ex. 15, R. 1135, v. II, with same exhibit R. 1139). At the meeting at

which this was done Clay and O'Shaughnessey were present and voted for this action.

At this time Cotton States was losing money at such a rate that these increased salaries could not be actually paid. During the years 1933 to 1941, when the net losses totaled $112,405, credits totaling $17,800 were accumulated on the company's books in favor of Clay and O'Shaughnessey (Defts. Ex. 195, R. 1865, v. III). Clay took the precaution to ascertain from counsel that these accruals, being debts, would come ahead of dividends on the preferred stock (Defts. Ex. 25, R. 1239-40, v. II).

In 1942 Cotton States began making money. Immediately bonuses were voted to Clay and O'Shaughnessey. On June 26, 1942, bonuses of 40% ($2,400 to Clay, $1,920 to O'Shaughnessey) were voted retroactively for the fiscal year ending June 30, 1942 (Pltfs. Ex. 15, R. 1177, v. II). On September 4, 1942, like bonuses were voted for the fiscal year ending June 30, 1943 (Pltfs. Ex. 15, R. 1179, v. II). On June 30, 1943, retroactive additional bonuses of 25% were voted for each of the fiscal years ending June 30, 1942 and June 30, 1943 (Pltfs. Ex. 15, R. 1182, v. II). On December 30, 1944 the board "ratified" bonuses of 65% which had been paid without any record of corporate action during the fiscal year ended June 30, 1944 (Pltfs. Ex. 15, R. 1183-4, v. II). In addition, it was testified that similar bonuses have been voted for the fiscal year ending June 30, 1945 (R. 891, v. II). In the aggregate, Clay and O'Shaughnessey voted themselves during the years 1942-5, practically all retroactively, bonuses of $19,500 and $15,600, respectively, or a total of $35,100.

Knowledge and Acquiescence [Question 2 under "Questions Presented"]: It is not feasible to discuss herein, in detail, the respondents' testimony upon which the courts below based their holdings in this regard. However,

analysis of the record shows that it is possible to classify this testimony into two general categories:

1. From time to time there were sent to Joel Hurt, Jr., as representative of the vendors, and/or to the petitioner herein, copies of balance sheets, statements of assets and liabilities, and profit and loss statements. The respondents introduced a mass of them in evidence, comprising 22 exhibits and occupying over 450 pages of the Record. These data were sent irregularly, and were generally furnished two to three years late (R. 445-6, v. I). On one occasion the vendors had to retain counsel in order to get the data, and, after a number of months' delay, they were compelled to accept a niggardly compromise under which their representative was allowed to look at the reports in counsel's office but forbidden to copy anything from them (Defts. Exs. 12-23, R. 1227-37, v. II). Close scrutiny of these data, and comparison of earlier with later reports, would have disclosed changes in certain of the accounts, but would have told nothing about the true character of the transactions which they reflected. To arrive at the latter, it would have been essential to get at records which were not made available to the vendors until September, 1943, and some of which they did not see until the trial (R. 501-5, 510, v. I). For example, nobody representing the vendors saw the Cotton States minutes before September, 1943. Even if they had been allowed to see the minutes of the July 19, 1932 meeting at which the Howell transaction was approved (R. 1109-14, v. II), they would only have been misled, since the contract of the same date (R. 42, v. I) was not in the minutes, and only careful comparison of those two, followed up by examination of the books to see what was actually done, would reveal the impropriety of this deal. The Thompson deal, as has been shown, was unrecognizable in the accounts and was affirmatively misstated in the corporate minutes. The vendors would have needed, not

diligence alone, but clairvoyance, to get at the truth of the transactions in suit from these data.

2. The respondents testified under careful leading, with sweeping inclusiveness, that in connection with the transactions in suit the representatives of the vendors were told everything that was done, when it was done. Where the respondents were testifying about alleged word-of-mouth disclosures, their testimony was general and conclusory, not factual; and where it was tested out it did not stand up. One instance must suffice. Thompson testified with respect to the Clay transaction that Joel Hurt, Jr. "was kept informed of this whole transaction that was involved * * * he was kept advised thoroughly all the way through" (R. 704, v. I); but on cross-examination he could not even remember that Clay's indebtedness had been satisfied, let alone how. All he could say was (R. 722, v. I): "I do not remember the circumstances or the details, but something was done by him at that time to lower his indebtedness." The respondents' writings stand scrutiny no better. Here again we confine ourselves to one example. Clay's June 9 letter to Hurt told the truth about the price which had been paid to Thompson, but this was followed immediately by the vitally important falsehood that neither Clay nor O'Shaughnessey had any interest in the purchase. This is readily established by comparing the pertinent language in Clay's letter, R. 53-4,[11] with the facts as disclosed during the trial (R. 938 *et seq.* and R. 1184 *et seq.*, v. II).

[11] It reads: "His [Thompson's] stock, notes and accounts were purchased in the name of the writer and W. J. O'Shaughnessey but a third party furnished the money and has a claim on all of Thompson's former holdings in the Company, as well as on mine and Mr. O'Shaughnessey's. * * * It is this third party, whose identity I cannot disclose, who would have to put up the money for the purchase of the preferred stock if an agreement can be had with the present owners as to its value."

Validity of Guaranty Agreement [Question 3 under "Questions Presented"]: The late George F. Hurt and Mrs. Willie Martin Hurt were husband and wife. The husband was anxious to get a divorce, but his wife did not want one (R. 2262, v. V). The husband filed suit nevertheless in December 1921, alleging cruelty (R. 2517-19). His wife cross-complained for divorce within a few days upon allegations which greatly scandalized the family (R. 2520-22), and then particularized her allegations so as to make them even more hurtful (R. 2524-6). The parties were at a bitter impasse, and the husband's suit and the wife's cross-suit idled on the docket of the court for almost a year.

In October, 1922 the parties entered into an agreement under which the husband undertook to pay substantial alimony (Defts. Ex. 178, R. 1523-9, v. III). The effectiveness of the agreement was conditioned upon the payments being guaranteed by the husband's father (par. 7 at R. 1527), which was not done until November (R. 1529). Additionally the agreement recited in paragraph 6 that "Mrs. Hurt is seeking a divorce from Mr. Hurt on the ground of desertion." That was not true. The wife's cross-complaint did not mention desertion. The quoted statement was an inadvertent admission of what the parties were really agreeing to do, and, in fact, did shortly thereafter. On January 8, 1923 the wife amended her cross-complaint so as to add an allegation of desertion. The husband then struck all the material allegations of his complaint, in effect withdrawing his action (R. 2526). Thereupon, on January 19 the wife further amended her complaint by striking the scandalous matter (R. 2527), and within a few days (February 6, 1923) the case was tried as an undefended suit by the wife against the husband, and she got her verdict on the ground of desertion (R. 2516).

Specification of Errors to be Urged

The Circuit Court of Appeals erred as follows:

(1) In Nos. 301 and 316:

(A) In holding without reference to Georgia law, and contrary thereto, that none of the transactions hereinabove set out "were illegal, done in fraud of the company, or otherwise exceptionable."

(B) In holding without reference to Georgia law, and contrary thereto, that ambiguous and equivocal disclosures to the injured shareholders barred recovery in the company's behalf for the said transactions.

(2) In No. 316:

(A) In holding that the petitioner had abandoned his appeal therein.

(B) In affirming dismissal on the ground that the stock, in right of which petitioner sues, was acquired by him after the occurrence of the things he complains of.

(3) In No. 324, in holding without reference to Georgia law, and contrary thereto, that the guaranty agreement is an enforcible obligation, and that the respondent Willie Martin Hurt is a creditor of the estate of Joel Hurt, Sr. by virtue thereof.

REASONS RELIED ON FOR GRANTING THE WRIT

I

In Nos. 301 and 316 the Court below has decided important questions of local law regarding the fiduciary responsibility of corporate officers and directors without reference to local law and in a way which is in conflict therewith.

A

"The source of substantive rights enforced by a Federal court under diversity jurisdiction, it cannot be said too often, is the law of the States" (*Guaranty Trust Co.* v. *York*, 326 U. S. 99, 112). In the cases at bar this mandate has been ignored. The courts below have proceeded without reference to controlling Georgia law, and plainly contrary thereto.

Standing on their own bottoms, the Howell, Clay and Thompson deals are classically simple instances of corporate officers and directors misappropriating company property and dealing with their company to their own enrichment. This conduct has been justified below, without any citation of authority whatever, on the ground that in consideration of their unlawful gains the officers and directors concerned made great exertions at a time when the company needed their utmost efforts, and that all things considered, the preferred stockholders may win back in the future, from the hoped-for success of these exertions, more than they have lost up to now by the misconduct. Upon this rationalization the Circuit Court of Appeals, adopting the respondents' argument, concluded that there was no accountability. The nub of the opinion below on this aspect of the case is in the following sentence (159 F. 2d at p. 57; R. 2595, v. V):

> "The fact that the company is now in greatly better shape than it was in then, that it has been yearly getting in better shape, that the R. F. C. loan

is about to be, or has already been, paid off, and that in time, the preferred stock, if conditions continue as at present, will be on a dividend basis and have real value, testify not only to the absence of fraud doing but to the wisdom and general fairness of the course then pursued and completely explain, indeed justify, acts now seized upon by plaintiffs as fraudulent outrages."

This sets up the intolerable principle that a trustee may have unlawful profits from the estate as incentive pay for exerting himself on its behalf. Two corollaries to this proposition, which the Court below also accepted, are that the trustee's accountability is conditioned upon and measured by the *cestui's* loss instead of the trustee's forbidden gains, and that when the *cestui* comes into equity for relief, he has the burden of showing damage and proximate cause; quite as though the action was for negligently operating a vehicle.

This is contrary to Georgia case and statute law. "All the authorities agree that he [the director] is a trustee for the company."[12] The respondents conceded below that this is Georgia law (R. 860, v. II; Defts. Ex. 58, R. 1331, v. II). However, they were allowed to escape the consequences through arguments in avoidance which Georgia law refuses to tolerate. " 'The trustee shall not use the trust funds to his own profit. He shall be liable to account for all such profits made.' Code of 1910, §3767; Code of 1933, §108-429. This principle applies where a fiduciary relation exists between the parties, whether or not the person occupying the position of trust is a technical trustee."[13] The Georgia rule is that

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[12] *Oliver* v. *Oliver*, 118 Ga. 362, 367. Even when the director is bargaining privately with an individual stockholder, "no amount of argument can destroy the fact that the director is, in a most important and legitimate sense, trustee for the stockholder" (*ibid*; cited with approval in *Strong* v. *Repide*, 213 U. S. 419, 431).

[13] *Swann* v. *Wright*, 180 Ga. 323, 326-7. See also Code §§22-711 and 37-708, pp. 32, 34, *infra*.

the fiduciary "can make no profit for himself out of the trust estate. If he risk the trust funds and lose, he is compelled to account for their full value; if he is successful, he is required to pay what he gains to the beneficiary of the fund embarked in the enterprise. This rule applies not only to trustees eo nomine, but to all persons sustaining confidential relations to others, such as executors and administrators, guardians, agents, officers, partners, etc."[14] It was further held in this case[15] that the fiduciary is forbidden to traffic in the estate "whether he acted bona fide or not, or whether actual gain resulted to him or not."

The offending fiduciary argued good faith and fairness in *Haley* v. *Atlantic National Fire Ins. Co.*, 151 Ga. 158, 163; but the Court said:

> "We do not assert that Mrs. Haley acted in bad faith. Under the authorities, the question of good faith, in such circumstances, is immaterial. It may be that the purchase by Mrs. Haley was in fact advantageous to the estate. This argument has been often advanced, and as often rejected. The broad rule of equity, applicable alike to agents, partners, guardians, executors, administrators, and directors and managing officers of corporations, is that it is the duty of a trustee not to accept any position or to enter into any relation or to do any act inconsistent with the interest of the beneficiary."[16]

The Georgia courts have adhered to the above principles with unbroken uniformity.[17] In so doing they not only obey the statutory mandate,[18] but are also in accord with—and have, indeed, expressly followed—the great

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[14] *Fricker* v. *Americus Improvement Co.*, 124 Ga. 165, 175.

[15] *Ibid*, p. 176.

[16] Citing Pomeroy, and Federal and New York cases.

[17] *Caldwell* v. *Hill* (1934) 179 Ga. 417, 425; *Perdue* v. *McKenzie* (1942) 194 Ga. 356, 364-5.

[18] Code §§22-711, 37-708, and 108-429, pp. 32-3, 34, and 35, *infra*.

Federal landmarks. The *Fricker* case, *supra*,[19] cites and follows *Wardell* v. *Union Pacific R. R. Co.*, 103 U. S. 651, 658, where it was held that corporate officers and directors are absolutely forbidden to put themselves in a position of "conflict between interest and duty" with respect to anything affecting the subject-matter of their trust, and that they cannot "enter into nor authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits." In the *Haley* case, *supra* (151 Ga. at 163) the Court approves *Trice* v. *Comstock*, 121 Fed. 620, 623, where Sanborn, J., wrote that the "inexorable principle" of a trustee's unconditional accountability for the profits of self-dealing "is not based upon, or conditioned by, the * * * injury or damage which the betrayal of the confidence given entails. It rests upon a broader foundation, upon that sagacious public policy which, for the purpose of removing all temptation, removes all possibility that a trustee may derive profit from the subject-matter of his trust, so that one whose confidence has been betrayed may enforce the trust which arises under this rule of law although he has sustained no damage."[20]

With respect to the salary increases and bonuses the courts below proceeded similarly without reference to Georgia law. The Circuit Court of Appeals recognized that Clay and O'Shaughnessey "did not have the power to vote themselves back salaries * * * and will be prevented from exercising that power when, as here, it is apparent that the result, if not the purpose, of the voting,

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[19] *Fricker* v. *Americus Improvement Co.*, 124 Ga. at p. 176.

[20] The Clay transaction was tainted with the further impropriety that it was a purchase by an insolvent company of its own stock. In *Fitzpatrick* v. *McGregor*, 133 Ga. 332, 342, the Court said: "We know of no case wherein it is held that an insolvent corporation has the power to purchase its own shares of stock." *Cf.* Code §22-709, p. 32, *infra*.

is to impose on the preferred stockholders."[21] That was sound enough as far as it went, since in Georgia corporate officers are forbidden retroactive awards of compensation precisely because they are trustees, wherefore they come under the rule that the law does not imply any promise to pay trustees for performing their duties as such.[22] However, in reaching the result that these respondents are accountable only for impositions retroactively perpetrated, and not for impositions currently perpetrated, the Court missed the whole point—to-wit, that imposition on the stockholders is the basic vice, which is aggravated by retroactivity, but does not depend therefrom.[23] On this score the courts below had before them, but wholly disregarded, the specific statutory provisions that the fiduciary "shall not use the trust funds to his own profit," and that, in consequence, corporate officers and directors are forbidden from "acting in their own interest in a manner destructive of the company, or of the rights of the other stockholders," and are further forbidden from "oppressively and illegally pursuing in the name of the corporation, a course in violation of the rights of the stockholders."[24] Under these statutory mandates together with the further Georgia authority already cited by us, the courts below had ample guidance to show them, without more,[25] that under Georgia law directors are forbidden to vote themselves as officers such salaries as practically amount to a division among themselves of the earnings

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[21] 159 F. 2d at p. 59 (R. 2598, v. V).

[22] *Home Mixture Guano Co.* v. *Tillman,* 125 Ga. 172, 179-80.

[23] As a matter of fact the Circuit Court of Appeals was not consistent even in this regard, condemning some but refusing to condemn others of the retroactive payments.

[24] *Swann* v. *Wright, supra,* 180 Ga. 323, 326-7; Georgia Code §§108-429 and 22-711, pp. 35 and 32-3, *infra;* and cf. Code §37-708, p. 34, *infra.*

[25] Cf. *Meredith* v. *Winter Haven,* 320 U. S. 228, 237.

of the corporation; that good faith requires them to adapt their compensation fairly to the financial condition of their company; and that when the company is suffering operating losses and inroads on its capital, it is bad faith on its face for the officers and directors to accumulate claims against it, as was done here, with the purpose of coming ahead of stockholders if and when the company's fortunes take a turn for the better. Particularly is this true when the salary increases and bonuses are awarded to themselves by directors who have voted themselves in as directors by means of their own stock control, and then, as directors, vote themselves into office and grant themselves the excessive compensation.[26]

B

Equally did the courts below proceed without reference to Georgia law, in holding that the respondents' unfrank "disclosures" sufficed to charge the injured stockholders with knowledge of the acts complained of. Suppression of a material fact is itself fraud where there is a duty to be frank, as, for example, between parties in

[26] The Court could also have looked, if it had wished, to such cases as *Backus* v. *Finkelstein,* 23 F. 2d 531, 537 (approved by the Fifth C. C. A. in *Flint River Pecan Co.* v. *Fry,* 29 F. 2d 457, 459), and *Decatur Mineral Land Co.* v. *Palm,* 113 Ala. 531, since they proceed on basic premises identical with those which prevail in Georgia. In the *Decatur* case the Court said (113 Ala. at 537): "These salaries not only consumed all the income, but encroached annually upon the capital assets, and if continued, would eventually leave nothing for the stockholders. The duty of a director is to act for the interest of the stockholders, and manage the affairs of the corporation for their benefit, and not for his personal gain. There was a direct conflict between the duty owed by these directors to the stockholders, and their self interest; and, as is frequently the case under such conditions, the frailty of human nature sacrifices duty to self interest. They fixed the salaries at exorbitant prices, then elected themselves to the offices. The fact that the president may have been unwilling to accept the office at a less salary, proves nothing in favor of the fairness and reasonableness of the amount."

confidential relations.[27] Under Georgia law it is not enough for a person in a fiduciary capacity to say, as Sir George Jessel put it,[28] "I gave you sufficient information to put you upon inquiry." This applies with full force to corporate officers and directors, because "the peculiar powers and special opportunities of these fiduciaries call for an enlargement rather than a restriction of the rule requiring disclosures," and the obligations of office of a company director "bring him peculiarly within the general doctrine which declares that concealment of material facts may of itself amount to a fraud."[29] Georgia law on this point is thus in line with what was written by the late Chief Justice in *Rogers* v. *Guaranty Trust Company,* 288 U. S. 123, 141:[30]

> "They [the stockholders] were entitled to read the proposal in the light of the fundamental duty of directors to derive no profit from their own official action, without the consent of the stockholders, obtained after full and fair revelation of every circumstance which might reasonably influence them to withhold their consent. [Citing cases.] They were entitled to assume that the proposal involved nothing which did not fairly appear on its face and above all that it was not a cloak for a scheme by which the directors were to enrich themselves in great amounts at the expense of the corporation, of whose interests they were the legal guardians."

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[27] Georgia Code, §§37-704, and 96-203, pp. 33-4 and 34-5, *infra; Little* v. *Haas,* (D. C., N. Dist. Ga. 1946), 68 Fed. Supp. 545, 555.

[28] *Dunne* v. *English,* L. R. 18 Eq. 535.

[29] *Oliver* v. *Oliver, supra,* 118 Ga. at 371.

[30] This case did not involve Georgia law, but no difference is perceived between the above and the Georgia rule. While the late Chief Justice's was a dissenting opinion, there was no division among the Court regarding the rule of required disclosure.

C

Not one Georgia case or provision of statute was cited by the District or Circuit Court of Appeals to support their holdings; and all the pertinent decisions and Code provisions that we have found condemn them.[31] The lower courts completely ignored substantive local law in their disposition of these cases, in violation of this Court's mandates regarding the only right basis for decision in diversity jurisdiction cases. The holdings at bar have introduced into the substantive law of Georgia concerning the obligations of corporate fiduciaries that "double system of conflicting laws in the same State," which this Court has called "plainly hostile to the reign of law" (*Guaranty Trust Co.* v. *York, supra,* 326 U. S. 99, 112). Such action calls for an exercise of this Court's power of supervision.

II

In No. 316 the Court below proceeded in plain disregard of the record.

In No. 316, as in the other two cases, the petitioner gave timely notice of appeal to the Circuit Court of Appeals, and filed his appeal bond seasonably (R. 2056-8, v. IV). The Circuit Court of Appeals noted in its opinion herein that the three cases, though not consolidated, were tried and submitted on appeal together (159 F. 2d at p. 54; R. 2588, v. V). The substantive issues were the same in No. 316 as in No. 301, and, naturally enough, counsel argued them together on the appeal. There was no jus-

[31] Indeed, the only Georgia case cited at all on these aspects was *Mathews* v. *Fort Valley Cotton Mills,* 179 Ga. 580, in footnotes 6 and 7, 159 F. 2d, pp. 58-9 (R. 2597-8, v. V), but in the text the Court itself recognized the inapplicability of this decision to the preferred stockholders in the actions at bar.

tification, therefore, for the holding that "appellant has abandoned here his appeal from the judgment in cause No. 316."

Nor was there any justification for the holding "that the stock, in right of which plaintiff sues, was acquired by him after the occurrence of the things he complains of" (159 F. 2d at p. 60; R. 2600, v. V). Petitioner acquired this stock December 10, 1943, whereas the Court recognized that there was ground for complaint "in respect of bonuses and additional compensation voted for 1944 and 1945," and remanded in No. 301 for proof as to them (159 F. 2d at pp. 60-1; R. 2601-2, v. V).

III

In No. 324 the Court has decided important questions of local law regarding validity of contract without reference to local law and in a way which is in conflict therewith.

In this action there are three controlling facts, two of which are not open to dispute, and the other of which is an inference compellingly required by the first two. These are: *first,* that the wife, Mrs. Willie Martin Hurt, did not want a divorce; *second,* that she and her husband were at an impasse which threatened to make it impossible for him to get divorced; and *third,* that to end the stalemate a financial agreement was entered into between husband and wife for the purpose, and with the effect, of inducing the wife to carry through the necessary proceedings to obtain a divorce.

In form, the agreement does not spell out in so many words that the wife's cooperation was being bought. In substance, that is exactly what the agreement provides. In fact, that is exactly what the agreement accomplished.

Under Georgia law such an agreement—"any agreement conditioned on the obtainment of a divorce, or in-

tended or calculated to facilitate its obtainment''—is void *ab initio* as against public policy.[32]

An agreement thus tainted cannot be made good by subsequent partial performance; nor can it be sustained upon any plea of ratification or estoppel. The public policy which makes the agreement void would be of no force if the parties could make the agreement binding by their own acts done under it.[33]

The fact that respondent Ellis, as administrator, contended below for the validity of this agreement is immaterial. Where an agreement offends public policy the administrator or executor can no more make it good by partial performance, estoppel, or concession of validity, than could his deceased (21 Am. Jur. 501, §230). We do not go into the question whether Mr. Ellis was in the proper discharge of his duty as administrator in making no effort in No. 301 to support the claims put forward by the petitioner in behalf of Cotton States, though one of those claims was held good on appeal and others of them may be held good on the remand, and in litigating in No. 324 in support of, rather than opposition to, a contested claim against his estate (21 Am. Jur. 575, §339). This much is clear, that the respondents take nothing by Mr. Ellis' position in these regards, either in No. 301 or in No. 324.

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[32] *Birch* v. *Anthony*, 109 Ga. 349; *Heath* v. *Philpot*, 39 Ga. App. 108; *Craig* v. *Craig*, 53 Ga. App. 632; *Ozmore* v. *Ozmore*, 179 Ga. 339; *Law* v. *Law*, 186 Ga. 113.

[33] Georgia Code, §§20-501 and 20-504, p. 32, *infra*. In *Bryson* v. *Keith*, 186 Ga. 616, 618, it was held: "If the contract [founded upon an illegal or immoral consideration] is executed, it will be left to stand; if it is executory, neither party can enforce it."

IV

The "two-court rule" does not preclude review herein.

The District Court's Findings regarding the Howell transaction go at length into the reasons why Cotton States settled with Howell and Planters Company for Howell's stock, but they are silent as to the diversion of almost 40% of the consideration (320⅔ shares out of 827⅓) to Clay and Thompson (Findings 21, 24, 25, 26, R. 1937-9, and Finding 63, R. 1950-1, v. III). The Findings regarding the Clay transaction mention, but give no effect to, Clay's "heads I win tails you lose" treatment of Cotton States from July, 1933 to July, 1934, and adopt as justification the irrelevant—and distorted—alleged recommendation of the RFC (Findings 27, 28, and 64, R. 1939-40 and R. 1951, v. III). The Findings regarding the Thompson transaction wholly ignore, as did the respondents in their pre-trial disclosures, the crux of that deal, *viz.,* the stock transaction (Findings 67-9, incl., R. 1951-2, v. III). The facts ignored are the very essence of the improprieties; yet the vendors have been charged with knowledge of what the Court itself missed or ignored; and the facts which were found, taken together with the results arrived at, show acceptance by the District Court of excuses that are inadmissible under controlling local law. The conclusory "Findings" (No. 57 as to salaries, No. 70 as to everything in suit—R. 1949 and 1952, v. III) are not true findings of fact, but "the ultimate judgment"[34]—and the facts proved and found do not support them. The Circuit Court of Appeals accepted the untenable excuses and approved the conclusory "Findings." The holdings below are not supported by concurrent findings of fact. They are vitiated, rather, by concurrent mis-

[34] *Baumgartner* v. *U. S.,* 322 U. S. 665, 670.

apprehension of law as to the right basis for decision in diversity jurisdiction cases.

So much for No. 301, with which is coupled No. 316. As to No. 324, only questions of law are presented, and these were decided contrary to local law.

How little these cases turn on disputed issues of fact will be clear, we think, from the face of this petition, wherein, out of 89 citations to the record, 63 are citations of undisputed documents, 24 are citations to the respondents' own testimony, and only 2 are citations to petitioner's testimony.

Under the holding in *Baumgartner* v. *U. S.*, 322 U. S. 665, the two-court rule does not preclude review herein.

WHEREFORE, it is respectfully submitted that the writ of certiorari herein prayed should issue.

April, 1947.

S. L. HURT,
Petitioner.

MURRAY C. BERNAYS,
Counsel for Petitioner.

JOHN L. WESTMORELAND,
of Atlanta, Georgia,
Of Counsel.

APPENDIX

Georgia Code of 1933, effective January 1, 1935 (numbers in parentheses are the corresponding sections of the 1910 Code)

§20-501 (4251) **Contracts to do immoral or illegal thing.**—A contract to do an immoral or illegal thing is void. If the contract be severable, that which is legal will not be annulled by that which is illegal.

§20-504 (4253) **Contracts against public policy; illustrations.**—A contract which is against the policy of the law cannot be enforced; such are contracts tending to corrupt legislation or the judiciary, contracts in general restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, contracts of maintenance or champerty.

§22-709 (2222) **Directors of insolvent corporations; duties.**—Directors primarily represent the corporation and its stockholders, but when the corporation becomes insolvent they are bound to manage the remaining assets for the benefit of its creditors, and cannot in any manner use their powers for the purpose of obtaining a preference or advantage to themselves.

§22-710 (2223) **Majority of stockholders entitled to control.**—So long as the majority of stockholders confine themselves within the charter powers, a court of equity will require a strong case of mismanagement or fraud before it will interfere with the internal management of affairs of a corporation.

§22-711 (2224) **Proceedings by minority stockholders, when allowed.**—A minority stockholder may proceed in

equity in behalf of himself and other stockholders for fraud or acts ultra vires against a corporation, its officers and those participating therein, when he and they are injured thereby. But there must be shown—

1. Some action or threatened action of the directors beyond the charter powers; or,

2. Such a fraudulent transaction completed or threatened, among themselves or stockholders or others, as will result in serious injury to the company or other stockholders; or,

3. That a majority of the directors are acting in their own interest in a manner destructive of the company, or of the rights of the other stockholders; or,

4. That the majority stockholders are oppressively and illegally pursuing, in the name of the corporation, a course in violation of the rights of the stockholders, which can only be restrained by a court of equity; and it must also appear—

5. That petitioner has acted promptly; that he made an earnest effort to obtain redress at the hands of the directors and stockholders, or why it could not be done, or it was not reasonable to require it; and

6. That petitioner was a stockholder at the time of the transaction of which he complains, or that his shares have devolved on him since by operation of law.

§37-704 (4624) **Suppression of the truth.**—Suppression of a fact material to be known, and which the party is under an obligation to communicate, constitutes fraud. The obligation to communicate may arise from the confi-

dential relations of the parties or from the particular circumstances of the case.

§37-706 (4626) **Presumption; slight circumstances sometimes sufficient.**—Fraud may not be presumed, but, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence.

§37-707 (4627) **Confidential relations.**—Any relations shall be deemed confidential, arising from nature or created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another; or where, from similar relation of mutual confidence, the law requires the utmost good faith; such as partners, principal and agent, etc.

§37-708 (4628) **Confidential relations preventing acquisition of adverse rights.**—Where by the act or consent of parties, or the act of a third person or of the law, one person is placed in such relation to another that he becomes interested for him or with him in any subject or property, he is prohibited from acquiring rights in that subject or property antagonistic to the person with whose interest he has become associated.

§37-710 (4630) **Inadequacy of consideration.**—Great inadequacy of consideration, joined with great disparity of mental ability in contracting a bargain, may justify equity in setting aside a sale or other contract.

§96-203 (4114) **Concealment amounts to fraud, when.**—Concealment of material facts may in itself amount to a fraud—

1. When direct inquiry is made, and the truth evaded.

2. When, from any reason, one party has a right to expect full communication of the facts from the other.

3. Where one party knows that the other is laboring under a delusion with respect to the property sold or the condition of the other party, and yet keeps silent. • • •

§108-429 (3767) **Profits made; accounting by trustee.**—The trustee shall not use the trust funds to his own profit. He shall be liable to account for all such profits made.

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IN THE

Supreme Court of the United States

October Term, 1946

No. 1239

S. L. HURT,

Petitioner,

versus

COTTON STATES FERTILIZER COMPANY *et al.*,

Respondents,

(District Court No. 301)

S. L. HURT,

Petitioner,

versus

COTTON STATES FERTILIZER COMPANY *et al.*,

Respondents.

(District Court No. 316)

S. L. HURT *et al.*,

Petitioner,

versus

FRAMPTON E. ELLIS, as Administrator de Bonis Non Cum Testamento Annexo of the Estate of Joel Hurt, Sr., Deceased, *et al.*,

Respondents.

(District Court No. 324)

REPLY BRIEF FOR PETITIONER

MURRAY C. BERNAYS,
Counsel for Petitioner.

JOHN L. WESTMORELAND,
of Atlanta, Georgia,
of Counsel.

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(District Court No. 324)

REPLY BRIEF FOR PETITIONER

Statement

This Court does not sit, in diversity jurisdiction cases, as a court of first instance to decide questions of State

law that ought to have been decided below.[1] Under that rule, and upon careful study of the Responses herein, we think that this is a case in which certiorari should be granted and reversal and remand ordered upon the present submission, without further argument.

We address ourselves to that proposition herein.

I. As to Nos. 301 and 316

The respondents make two contentions in opposition to the petition: *first*, that the questions presented are contrary to the District Court's Findings (Response, pp. 2-12); *second*, that the courts below did decide the issues with reference to Georgia law (Response, pp. 12-20).

The first argument begs the question. Where the courts below have applied the wrong rule of decision, it is irrelevant to argue in this Court that they reached the right result. "While respondent contends that the decision below is not in conflict with local law, it is not necessary for us to determine that question. It is enough to say that the questions to be decided are those of state law and should have been determined according to the decisions of the state court."[2]

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[1] *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Klaxon Company* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 497; *Huddleston* v. *Dwyer*, 322 U. S. 232, 237.

[2] *Rosenthal* v. *New York L. Ins. Co.*, 304 U. S. 263, 264. Were the rule otherwise, the respondents' first argument would still be bad. The respondents do not controvert any of the facts set out at pp. 8-15 of the petition regarding the transactions in suit. Thus, for example, they concede *sub silentio* the secret diversion of corporate property to Clay and Thompson in the Howell transaction, and the secret appropriation of corporate property by Clay and O'Shaughnessey in the Thompson transaction. The respondents merely quote from the District Court's Findings as though that were the end of the matter; but these Findings are defective on their face, in that the District Court ignored the very features of the transactions which constituted the fraud in them. Pp. 2-12 of the

The respondents' second argument will not bear analysis either:

(a) The respondents would have it supposed that the District Court must have decided the issues with reference to Georgia law, because the Conclusions of Law were couched in the language of two sections of the Georgia Code. But the same language might just as well have been culled from any number of elementary texts on these subjects, and from Federal as well as State sources. For example, Conclusion of Law No. 4 in No. 316 reads (R. 2054, v. IV): "The plaintiff was not a shareholder in Cotton States Fertilizer Company at the time of the transaction of which he complains, nor did his shares thereafter devolve on him by operation of law." It would be the merest guess to attempt to say whether this comes from §22-711 of the Georgia Code (see Appendix to petition, p. 33), or Rule 23(b) (1) of the Federal Rules of Civil Procedure, or any general text. The words used show nothing as to the thinking that underlay them. The District Court could perfectly well have worded its Conclusions as it did before *Erie* v. *Tompkins* had been decided, when it was commonly supposed that "this question of a director's dealing with his corporation is one of general law."[3]

Response only emphasize the fact that the omissions noted, and the criticisms made, at p. 30 of the petition are exactly in accordance with the Record. Accordingly, neither the rule that the findings of the District Judge must stand unless clearly erroneous, nor the two-court rule, would be a bar to review by this Court, even if the correct rule of decision had been applied below. The case would then be one where a circuit court of appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions" (cf. *Ruhlin* v. *New York L. Ins. Co.*, 304 U. S. 202, 206), a proposition which the petition demonstrates and the Response does not meet.

[3] *Ransome Concrete Machinery Co.* v. *Moody*, 282 Fed. 29, 34 (2d C. C. A., 1922).

(b) The ultimate error below is apparent from one sentence at page 13 of the Response, where we read: "The 'substantive local law' is found in Georgia statutes"—and thereafter, whenever in the Response "substantive local law" is spoken of, it is spoken of as synonymous and co-extensive with §§22-710 and 22-711 of the Georgia Code. This occurs not less than five times in this part of the argument. Nowhere in the Response is any consideration given to the abundant body of Georgia case law, cited in the petition, which lays down the fundamentals of fiduciaries' obligations and interprets the pertinent Code provisions on the subject; and nowhere is any attempt made to reconcile with the stern integrity of that law, the approval given below to the respondents' transactions of self-enrichment. Looking to the State statute alone, without full consideration of the decisions which construe it, has been expressly condemned by this Court as non-compliance with the duty of Federal courts in diversity jurisdiction cases "to ascertain and apply the State law, where, as in this case, it controls decision."[4]

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[4] *Huddleston* v. *Dwyer, supra,* 322 U. S. at p. 236. In *Ruhlin* v. *New York L. Ins. Co., supra,* this Court said (304 U. S. at p. 209): "The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done in actions brought in the federal courts involving what were known as matters of 'local' law." If State law is not definitely settled, it must be searched far enough to determine what it probably will be when the highest court of the State does speak upon it (*West* v. *American Telephone & Telegraph Company,* 311 U. S. 223). A holding that mere gestures of deference to State law, such as the respondents suggest in this case, suffice, would as effectively "thwart the purpose of the jurisdictional act" as would a refusal to consider State law at all. Cf. *Meredith* v. *Winter Haven,* 320 U. S, 228, 234-5.

(c) As regards the opinion of the Circuit Court of Appeals, the Response shows that certain Georgia cases set out at pages 16-20 "were cited to the Circuit Court of Appeals at pages 194-198 of our brief there." However, the question is not what authorities the parties cited, but what rule of decision the Court applied. In *Klaxon Company* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487, 496, this Court reversed and remanded because the Circuit Court of Appeals' decision "apparently followed from the court's independent determination of the 'better view' without regard to Delaware law, for no Delaware decision or statute was cited or discussed."[5] Similarly, there was modification and remand in *Hammond* v. *Schappi Bus Line,* 275 U. S. 164, 169, because this Court could not determine from the proceedings below whether the holding of invalidity of the ordinance there in question "results from the provisions of a state statute, or from the constitution of the state, or from the 14th Amendment."

(d) At page 15 of the Response it is stated, with typographical emphasis, that none of the Georgia cases cited by the petitioner in Nos. 301 and 316 "was cited to the Circuit Court of Appeals by the petitioner when he was the appellant in the Court below." Apparently the respondents offer this as justification for the Court's failure, so plainly reflected in its opinion, to refer to Georgia law for decision of the issues. However, the obligation of federal courts in diversity jurisdiction cases to follow the substantive law of the States is not conditioned upon the industry of counsel or the fruitfulness of its results. This Court has repeatedly made it plain that not only the parties, but, as well, "the federal courts must now search

[5] The court further said (p. 497): "Looking then to the Delaware cases, petitioner relies on one group to support his contention * * * and respondent on another to prove the contrary. We make no analysis of these Delaware decisions, but leave this for the Circuit Court of Appeals when the case is remanded."

for and apply the entire body of substantive law governing an identical action in the state courts";[6] and this "is the duty of the federal appellate courts, as well as the trial court."[7]

II. As to No. 324

What we have said regarding the Response in Nos. 301 and 316 is entirely applicable, *mutatis mutandis*, to No. 324. The Circuit Court of Appeals did, to be sure, cite Georgia law for collateral and procedural features of this case (footnotes 13 and 14, R. 2600-01, vol. V), but it cited no authority whatever for the substantive issue therein, viz., the validity of the agreement. This last the Circuit Court of Appeals disposed of in one sentence: "As to Mrs. Hurt's claim against the estate, we think it quite clear that the record supports the finding of the district judge that she had a substantial claim against the estate which is valid and unpaid for an amount considerably in excess of the present value of the certificate in controversy." Yet the breadth as well as the strictness of the Georgia rule is not in dispute: at page 14 of the Response it is conceded that under Georgia law "it is true that a contract between husband and wife made with the intention of promoting a dissolution of the marriage relation is contrary to public policy and void"; the respondent recognizes (although he seeks to distinguish) the authority of *Birch* v. *Anthony*, 109 Ga. 349, wherein the court condemned not only "any agreement conditioned on the obtainment of a divorce," but any agreement "intended or calculated to facilitate its obtainment"; and the unenforceability of the executory portions of such an agreement is equally plainly provided in Georgia law (petition,

[6] *Ruhlin* v. *New York L. Ins. Co., supra,* 304 U. S. at p. 209.

[7] *Huddleston* v. *Dwyer, supra,* 322 U. S., at p. 236.

p. 29, footnote 33). Surely, if on this decisive point of the case the Circuit Court of Appeals was looking to Georgia law, something would have appeared in the opinion—and the parties and this Court were entitled to have something appear in the opinion[8]—to show that it was under Georgia authority that the Circuit Court of Appeals reached the conclusion either that the agreement was good in its inception, or that it was made good by the conduct of the parties, or both. In point of fact, the Circuit Court of Appeals avoided holding on either of these points, and thereby avoided reference to Georgia law entirely. This is plain from the sentence which we have quoted above, wherein the Circuit Court of Appeals refers to the record, but not to the authorities, and makes no mention of the agreement as such, but limits itself to the conclusory statement that the wife "had a substantial claim against the estate which is valid and unpaid."

For the rest, the Response herein is built around the proposition, which we have already conceded in the petition, that the agreement between the husband and wife did not provide in so many words for an uncontested divorce proceeding. However, the situation of the parties, their negotiations, the nature of the agreement between them, and their conduct before and immediately after making the agreement, none of which is denied in the Response, make it clear that arranging for an uncontested divorce was exactly what the parties intended, and what they did. We press this point, because the factual realities make it so emphatically clear that in No. 324, as in Nos. 301 and 316, Georgia law was disregarded in the dispositions below.

III. Alternative Ground for Granting the Writ

The importance of maintaining strict standards of integrity in a director's dealing with his corporation does not need to be labored. We have demonstrated in our petition

[8] Cf. *Huddleston* v. *Dwyer, supra,* 322 U. S. at p. 237.

that if, contrary to all the reasonable indications, the Courts below did proceed with reference to Georgia law, then this is a case in which they have decided an important question of local law in a way probably in conflict with applicable local decisions. It is quite impossible to reconcile the results arrived at below with the Georgia statute and case law cited in our petition; and we think it would not be unfair to say, that no serious attempt at such reconciliation is made in the Responses herein.

CONCLUSION

We respectfully submit that, upon the submission already made, certiorari should be granted, the judgment of the Circuit Court of Appeals vacated, and these causes remanded for determination in conformity with the correct rule of decision;[9] or, if the Court reaches the conclusion that the courts below did decide with reference to Georgia law, then certiorari should be granted on the alternative ground, appearing in our petition and hereinbefore referred to, that the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

May, 1947.

S. L. HURT,
Petitioner,

MURRAY C. BERNAYS,
Counsel for Petitioner.

JOHN L. WESTMORELAND,
of Atlanta, Georgia,
of Counsel.

[9] *Rosenthal* v. *New York L. Ins. Co., supra,* 304 U. S. 263.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 1239.

S. L. Hurt, Petitioner,

versus

Cotton States Fertilizer Company et al., Respondents,
(District Court No. 301).

S. L. Hurt, Petitioner,

versus

Cotton States Fertilizer Company et al., Respondents,
(District Court No. 316).

S. L. Hurt et al., Petitioners,

versus

Frampton E. Ellis, as Administrator de Bonis Non Cum Testamento Annexo of the Estate of Joel Hurt, Sr., Deceased, et al., Respondents,
(District Court No. 324).

RESPONSE

Of the Respondents in District Court Cases Numbers 301 and 316, to the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

CHARLES J. BLOCH,
Counsel for Named Respondents.

ELLSWORTH HALL, JR.,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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Cases Cited.

Statute Cited.

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(District Court No. 324).

RESPONSE

of Cotton States Fertilizer Company, C. B. Clay, and W. J. O'Shaughnessey, to the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

DISTRICT COURT CASE NO. 301.

This case was a stockholders' derivative action, instituted in the District Court of the United States for the Middle District of Georgia on June 14, 1944, by S. L. Hurt

and Mrs. Virginia L. Hurt (Mrs. Joel Hurt, Jr.). It was dismissed voluntarily as to Mrs. Hurt. It was first heard on July 6, 1944. The District Judge then held that the plaintiff was not entitled to sue. Upon appeal to the Circuit Court of Appeals, that judgment was reversed (Hurt v. Cotton States Fertilizer Company et al., 145 Fed. [2] 293).

The Circuit Court of Appeals there held that the plaintiff as a residuary legatee was at all times within which his complaint dealt, an equitable owner of the stock and therefore entitled to maintain the suit. The appellees filed in this Court their application for a writ of certiorari. It was denied (324 U. S. 844). Thereafter, the case was fully heard by the District Judge without a jury. Full findings of fact and of law were made. The judgment was for the defendants. It was adjudged that the prayer of the complaint be denied.

Upon appeal to the Circuit Court of Appeals, this judgment was affirmed, and remanded with a direction in one respect (159 Fed [2] 53).

Now comes this petition for certiorari.

Contrast of "Questions Presented" by Petition for Certiorari With Findings of Fact.

At page three of the petition for certiorari, under the heading "Questions Presented," the petition states as the first question, denominated 1a: "Whether, in a diversity jurisdiction suit, the Federal Courts in Georgia were free to decide, without reference to Georgia law, that there was nothing illegal, fraudulent, or otherwise exceptionable in the following transactions between Cotton States Fertilizer Company, a Georgia corporation, and certain of its officers and directors:

a. A transaction in which the three officers and directors of Cotton States caused the corporation to satisfy $49,102.68 of undisputed debts owing to it by one of the directors and a company in which he was interested, upon payment "of a part of the consideration to Cotton States and a part of it to the two other directors—it being undisputed that the two directors to whom the part was diverted paid Cotton States nothing for it."

At pages eight-ten, inclusive, of the petition for certiorari, this transaction is denominated "Howell Transaction." This transaction occurred in 1932, more than twelve years prior to the institution of the suit.

With respect to it, the District Judge specifically found:

> "In order for the Cotton States Fertilizer Company and its officers to be able to consummate the agreements of June 11, 1932, which had been made with Joel Hurt, Jr., it was necessary for there to be a unanimous vote of the stockholders of Cotton States Fertilizer Company. S. F. Howell was a stockholder, and his affirmative vote was necessary. During all negotiations in the early part of the summer of 1932 between Joel Hurt, Jr., S. A. Lynch, and the officers of Cotton States Fertilizer Company, Joel Hurt, Jr., was familiar with the fact that S. F. Howell and a company in which he was interested, the Planters Seed and Drug Company, owed Cotton States Fertilizer Company a large sum of money, which they were unable to pay on account of the depression, that Howell was a stockholder, and that his assent was necessary in order to consummate the agreements of June 11, 1932" (Finding of Fact 24; R. pages 1938-39).

The District Judge also specifically found:

> "Joel Hurt, Jr., knew prior to June 1, 1932, that it would be necessary to amend the charter of Cotton States Fertilizer Company in order to accept a sur-

render of common stock standing in the name of S. F. Howell" (Finding of Fact 25; R. page 1939).

The District Judge also specifically found:

"Prior to July, 1932, Joel Hurt, Jr., had been advised by George F. Thompson, then an officer and director of Cotton States Fertilizer Company, of the fact that a meeting of stockholders would have to be held, and that those things which were done at the meeting of stockholders of July 19, 1932, would have to be done" (Finding of Fact 26; R. page 1939).

The District Judge also found:

"As to all transactions complained of in the complaint, the defendants acted in good faith and exercised sound business judgment in the light of circumstances as they existed at the time of the various transactions" (Finding of Fact 70; R. page 1952).

[As to this "question presented" and the other two which will later be discussed, it is timely to call attention to the following language of the Circuit Court of Appeals in its opinion:

"As to No. 301, it will serve no useful purpose to detail the evidence as to each of the transactions under attack, nor to set out the findings of the District Judge as to them. It is sufficient to refer to the rule which declares that the findings of the District Judge must stand unless clearly erroneous, and to say that, except as hereinafter mentioned, the evidence fully supports the findings."

(Hurt v. Cotton States Fertilizer Company, 159 Fed. [2] 52, Loc. Cit. page 56)].

Question 1b states, with the same preface as 1a, the following:

"A transaction in which the officers and directors of Cotton States caused the Company to satisfy $18,352.75 of undisputed indebtedness owing to it by one of the

directors in consideration of his surrendering to Cotton States shares of its common stock at a time when the Company was admittedly insolvent and that said shares were worthless?" (Petition for Certiorari, page four.)

At page ten of the petition for certiorari, this "question presented" is denominated as the "Clay Transaction."

As to this transaction, the District Judge held as follows:

"In 1934, financial conditions in this area were in a depressed state. The financial affairs of Cotton States Fertilizer Company were such that it would have had to have been liquidated unless financial assistance could have been secured. The officers of the Company determined to apply to the Reconstruction Finance Corporation for a loan, to be secured by a first mortgage on all its assets. Erle Cocke, who had formerly been employed by the Company, was then Agency Manager of the Reconstruction Finance Corporation in Atlanta. Conferences were held by the officers of the Company with Cocke and W. J. Davis, Assistant Manager of the Reconstruction Finance Corporation, and the officers of the Company were advised that all assets on the books of the Company which were not collectible should be charged off before the formal application was filed. C. B. Clay and Growers Service and Supply Company were then indebted to the Company, and Joel Hurt, Jr., had knowledge of those indebtednesses. These accounts had become valueless. **Reconstruction Finance Corporation would not grant a loan unless Clay agreed to remain in active charge of the affairs of the Cotton States Fertilizer Company.** On June 30, 1933, the directors had authorized the Treasurer of the Company, in his discretion, to accept from Clay 338 shares of common stock of the Company to be placed in the treasury, in full settlement of the indebtedness then due by him to the Company. **George F. Thompson was at that time the**

majority common stockholder of the Company and in voting control of it. At the time the loan was made by Reconstruction Finance Corporation, it required Clay and Thompson personally to guaranty the loan."

"On July 21, 1934, a meeting of the Board of Directors of Cotton States Fertilizer Company was held and at that meeting the Company's investment in and advances to Growers Service and Supply Company were reduced to one dollar, and notes and accounts of C. B. Clay owing to the Company, in the amount of $18,352.75, were cancelled and removed from the balance sheet as of June 30, 1934, in consideration of the transfer and surrender by C. B. Clay to the treasury of the Company of 338 shares of common stock. At this time, Clay had agreed personally to guaranty the loan to be made by the Reconstruction Finance Corporation, and to remain in charge of the affairs of the Company. On July 24, 1934, George F. Thompson and W. J. O'Shaughnessey discussed with Joel Hurt, Jr., all affairs of the Company, including Clay's indebtedness to the Company and the Growers Service and Supply Company's indebtedness. Hurt was apprised of the Company's action in charging them off. On July 23, or 24, 1934, Thompson apprised Joel Hurt, Jr., of what had been done at the meeting of the directors of the Cotton States Fertilizer Company held on July 21, 1934." (Findings of Fact 27-31, inclusive; R. pages 1939-1941, inclusive.) (Emphasis ours.)

With full knowledge of these transactions, the plaintiff's agent consented to a write-down of the preferred stock of the Company, and as a result of the contract which immediately ensued, new preferred stock was issued to petitioner's family, in right of which he has sued (Findings of Fact 33-38; R. pages 1941-1943).

The sum and substance of the transaction was: Clay was indebted to the Company. Clay held stock in the Company. Clay was not in control of the Company. Clay was authorized by those in control to surrender part of

his stock in satisfaction of his indebtedness. Clay then personally guaranteed the R. F. C. loan, which permitted the Company to survive. This loan would not have been granted unless Clay agreed to remain in active charge of the affairs of the Cotton States Fertilizer Company. Clay did so agree.

In Finding of Fact No. 70, the trial Judge also held that in this transaction the defendants acted "in good faith and exercised sound business judgment in the light of circumstances as they existed at the time of the various transactions" (R. 1952).

> ". . . at the very time and as a part of the transactions of which plaintiff now complains, he and the others interested with him, knowing the difficult position the Company was in and the danger of its insolvency, agreed not only to cut their preferred shares in half, but to accept in lieu thereof certificates containing restrictive provisions, which prove more strongly than any oral testimony could do that everything that was done was in a desperate effort to rid a greatly encumbered concern of burdens and difficulties not otherwise to be borne by putting its exhausted and meager present in pledge in the hope of better times and prospects in the long future. The fact that the Company is now in greatly better shape than it was in then, that it has been yearly getting in better shape, that the R. F. C. loan is about to be or has already been paid off, and that in time the preferred stock, if conditions continue as at present, will be on a dividend basis and have real value, **testify not only to the absence of fraud doing, but to the wisdom and general fairness of the course then pursued, and completely explain, indeed justify, acts now seized upon by plaintiffs as fraudulent outrages.**"

The foregoing quotation is from the opinion of the Circuit Court of Appeals in this case, at page 57 of the 159 Fed. (2). The emphasis is ours.

With the same preface as hereinbefore stated, Transaction C is stated at page four of the petition for certiorari:

> "A transaction, carried out at a time when Cotton States was solvent and prospering, and its stock was valuable, in which two of the Company's officers and directors purchased on its behalf debts owing by it, together with shares of its common and preferred stock, but so manipulated the transaction that for $15.22 they got secretly and still retain stock thus purchased, which included the controlling common stock (607⅔ shares out of 1,035⅓ issued and outstanding)."

At page eleven of the petition, this is denominated as the "Thompson Transaction."

The contention of the petitioner with respect to this transaction, as expressed in his petition for certiorari, is strikingly different from the Findings of Fact made by the trial Judge with respect thereto, which Findings of Fact were affirmed by the Circuit Court of Appeals. The Findings of Fact are Numbers 67-69, inclusive (R. 1951-52), and are as follows:

> 67. "On and prior to April 30, 1943, C. B. Clay and W. J. O'Shaughnessey purchased valid and legal obligations due by Cotton States Fertilizer Company, which amounted, principal and interest, to $55,934.82. The obligations of the Company purchased by Clay and O'Shaughnessey had been shown on audits of the Company since their inception, and these indebtednesses were known or should have been known to Joel Hurt, Jr.
>
> 68. "The actual amount of money invested by C. B. Clay and W. J. O'Shaughnessey in their purchase of the obligations mentioned in the foregoing Finding, is $25,474.86, plus interest, making the aggregate $28,022.35. This amount was paid by the Company to C. B. Clay and W. J. O'Shaughnessey on December 30, 1944, and they immediately loaned $28,000.00 of it to

the Company at 5 per cent. interest per annum, so that the working capital of the Company would not be impaired.

"These debts are valid and legal obligations of the Cotton States Fertilizer Company, subordinated to the present Reconstruction Finance Corporation loan as it now exists.

69. "This method of handling the transactions considered in the preceding two Findings, benefited the Company to the extent of approximately $30,000.00."

That transaction is also covered by the general Finding of Fact Number 70.

With the same preface, the petitioner states Question 1d as follows:

"A course of practice over a period of years under which Cotton States' officers and directors used up the Company's distributable profit by paying it to themselves as salary increases and bonuses."

With respect to this, the District Judge held:

"At no time have the officers of the Cotton States Fertilizer Company voted to or paid themselves exorbitant salaries. The salaries and bonuses which have been paid and voted constitute reasonable allowances for personal services rendered. No salaries and bonuses have been paid or voted which violated the provisions of the outstanding preferred stock of Cotton States Fertilizer Company." (Findings of Fact Numbers 57-58; R. 1949.)

Based on all his Findings of Fact and Conclusions of Law, the trial Judge rendered a judgment denying all the prayers of the complaint. He had approved **all** salaries and bonuses paid as constituting reasonable allowances for personal services rendered. In this respect alone was his judgment modified by the Circuit Court of

Appeals. With respect to this phase, the Circuit Court of Appeals said:

> "In Cause No. 301, the judgment denied all the prayers of the complaint. These prayers, since the petition was filed April 18, 1944, certainly included the recovery of the retroactive bonuses voted in June, 1943, which we have condemned, and since, though the petition was not amended, evidence was offered without objection in respect of bonuses and additional compensation voted for 1944 and 1945, the petition may be considered amended so as to include them. The judgment in Cause No. 301, therefore, except as to the additional retroactive compensation voted in June, 1943, and as to bonuses and additional compensation voted in the years following, will be in all things affirmed. As to these bonuses and additional compensation, the Cause will be remanded with directions to permit amendment of the pleadings to bring them down to date in respect to the claims as to them, and to proceed to hearing and judgment in accordance herewith" (pages 60-61 of 159 Fed. [2]).

Under "Questions Presented," No. 2 is:

> "Whether in such a suit, the Federal Courts in Georgia were free to decide, without reference to Georgia law, that recovery is barred by reason of a showing that the representative of the injured shareholders was given, from time to time, such information that if he had caused it to be analyzed by counsel and accountants, he might have been put upon inquiry sooner regarding the transactions in suit."

The statement of this question is not in accord with the Findings of Fact.

At page 56 of the opinion of the Circuit Court of Appeals, the various wrongs alleged by the petitioner are stated seriatim. The first thus stated is denominated, in footnote 2, as the "Howell Deal." The second is denominated, "Growers Service and Supply Company."

Findings of Fact 24, 26, 30, 31, 63, 65 (R. 1938, 1939, 1940, 1941, 1950, 1951) show **actual knowledge** on the part of Joel Hurt, Jr., who is admitted to have been the agent of the petitioners (R. page 10) in these transactions. It was not necessary that he should have caused the information received by him to be "analyzed by counsel and accountants," to be apprized of the transactions. The Findings of Fact conclusively determine that he knew of them.

The same is true of what is denominated as the "Clay Deal." [Findings of Fact 27, 30, 31, 63, 64 (R. 1939, 1940, 1941, 1950, 1951).]

In Finding of Fact No. 30 (R. 1940) is a categorical finding that on July 24, 1934, "Hurt was apprized of the Company's action" in charging off Clay's indebtedness.

Finding of Fact No. 64 would, standing by itself, be conclusive of this question. That Finding of Fact is:

> "Prior to the issuance of the new or second of present preferred stock of Cotton States Fertilizer Company in 1934, Joel Hurt, Jr., knew of C. B. Clay's indebtedness to the Company and knew of the plans to charge this indebtedness off. He knew that the Reconstruction Finance Corporation required Clay's personal guaranty of any loan made by it to the Company, and knew that it would not make any loan unless Clay continued to manage the affairs of the Company" (R. 1951).

As to the "Thompson Deal", the record shows that petitioner's own accountant analyzed the books of the Company on September 23, 1943, and gave to petitioner information with respect to this transaction (Plaintiff's Exhibit "P"; R. 57, 61). This same accountant also reported fully with respect to salaries and bonuses (R. page 62).

> "All salaries and bonuses have been properly approved in the minutes of meetings" (Report of Petitioner's Auditor [R. page 62]).

All these salaries were shown in the annual audits of the Company made by certified public accountants.

> "The books and accounts of Cotton States Fertilizer Company have been open to the inspection of Joel Hurt, Jr., and the Executors of the last will and testament of Joel Hurt, Sr., at any time they desired to inspect them. Reports as to the condition of the Company and examinations made by L. D. Baggs & Company, Certified Public Accountants, and other certified public accountants, have been periodically sent to Joel Hurt, Jr., and S. L. Hurt" (Finding of Fact; R. 1940).
>
> "Viewed piecemeal or as a whole then, the record furnishes no support for the charges of fraud and overreaching, with which the petition so plentifully abounds. On the contrary, except as to the retroactive compensation voted in June, 1943, which is without legal basis, and perhaps as to bonuses and additional compensation voted for 1944 and 1945, it supports the Findings of the District Judge in effect that what was done was done, not fraudulently, oppressively, or illegally, but honestly, legally, and in good faith, and with the best interests of the corporation in mind" (Pages 59-60 of the Opinion of the Circuit Court of Appeals, 159 Fed. Rep. [2]).

Were these questions decided by the Federal Courts, "without reference to Georgia law?"

At page twenty-seven of the petition for certiorari, it is stated:

> "Not one Georgia case or provision of the statute was cited by the District or Circuit Court of Appeals to support their holding; and all pertinent decisions and Code provisions that we have found condemn them. The lower Courts completely ignored substantive local law in their disposition of these cases, in violation of this Court's mandates regarding the only right basis for decision in diversity jurisdiction cases."

The statement that the lower Courts "completely ignored the substantive local law in their disposition of these cases" is absolutely without foundation.

That the petitioner is in error in making such a statement can be conclusively shown by a simple comparison of the Georgia statute with the Conclusions of Law of the District Judge in these cases.

The "substantive local law" is found in Georgia statutes. It is found in Georgia Code Sections which are appended to the petition. Those Code Sections are Sections 22-710 and 22-711 of the Georgia Code of 1933 (Appendix to Petition for Writ of Certiorari, pages 32-33).

The Georgia statute, the "substantive local law", Section 22-710 of the Georgia Code of 1933, is:

> "So long as the majority of stockholders confine themselves within the charter powers, a Court of Equity will require a strong case of mismanagement or fraud before it will interfere with the internal management of the affairs of a corporation."

To apply this "substantive local law" in disposing of this case, the District Court held:

> "The common stockholders, officers, and directors of Cotton States Fertilizer Company, in the transactions complained of, confined themselves within the charter powers of the Company. The evidence does not disclose any mismanagement or fraud" (Conclusions of Law 11, 12; R. 1954).

The "substantive local law" as embodied in Georgia Code of 1933, Section 22-711, is that a minority stockholder may proceed in equity in behalf of himself and other stockholders for fraud, or acts ultra vires against a corporation, its officers, and those participating therein, when he and they are injured thereby. Before doing so,

he must demonstrate one of four factors. This statute provides that he must show some action or threatened action of the directors beyond the charter powers. Conclusion of Law No. 11 (R. 1954) is that the directors confined themselves within the charter powers.

Conclusion of Law No. 14 is:

> "No action or threatened action of the directors beyond the charter powers of the corporation is shown" (R. 1955).

Our Georgia statute provides there must be shown "such a fraudulent transaction, complete or threatened, among themselves or stockholders or others as will result in serious injury to the company or other stockholders."

Conclusion of Law No. 15 is:

> "No fraudulent transaction, completed or threatened, among the stockholders, directors, or others, is shown as would result in serious injury to the company or other stockholders" (R. 1955).

Our Georgia statute says:

> "There must be shown that a majority of the directors are acting in their own interest in a manner destructive of the company or of the rights of the other stockholders" (R. 1955).

Conclusion of Law 12, heretofore set out, disposes of this element of the statute.

Our Georgia statute provides it must be shown "that the majority stockholders are oppressively or illegally pursuing, in the name of the corporation, a course in violation of the rights of the stockholders, which can only be restrained by a Court of Equity."

Conclusion of Law No. 16 (R. 1955) categorically states: "The defendants are not and have not oppressively and

illegally pursued, in the name of the corporation, a course in violation of the rights of stockholders, which can only be restrained by a Court of Equity."

The truth of the case is that the trial Court and the Circuit Court of Appeals carefully measured the **facts** by the yardstick of the Georgia statute, and held:

> "The complaint, considered in connection with the Findings of Fact and the evidence, fails to state a claim upon which the relief sought can be granted. Under the Findings of Fact and the evidence, the plaintiff is not entitled to the relief sought" (Conclusions of Law Nos. 19 and 20, R. 1955).

The lower Courts also applied another provision of the "substantive local law." This same Section of the Code (22-711) provides that it must appear "that petitioner has acted promptly." The trial Court distinctly held: "The plaintiff did not act promptly with respect to the subject matter of the complaint" (Conclusion of Law 8; R. 1954).

Petitioner complains that neither the District Court nor the Circuit Court of Appeals cited a Georgia case. Perhaps both Courts thought that it was unnecessary to cite any decision when the Georgia **statute** controlled the case. It is noteworthy that **no Georgia case, now cited in the petition for writ of certiorari was cited to the Circuit Court of Appeals by the petitioner when he was the appellant in the Court below, except the case of Birch v. Anthony, 109 Ga. 349, and that case does not have to do with case No. 301, but was cited in connection with case No. 324.**

The statutes of the State of Georgia (Code of 1933, Section 22-711) provide under what circumstances a minority stockholder may proceed against a corporation, its officers and directors. The Conclusions of Law, as rendered by the trial Judge, and affirmed for the most part by the Circuit Court of Appeals, summarized are simply that the

plaintiff did not show by facts what he was required to show under that statute in order to have the relief he prayed.

In his Thirteenth Conclusion of Law, the trial Judge held that the evidence did not authorize him to interfere with the internal management of the affairs of the defendant Company. That finding was simply an application of the undisputed Georgia law to the facts of this case:

> "Where a minority stockholder in a corporation files an equitable petition against the corporation and the individual members thereof, who are majority stockholders, for appointment of a receiver, for audit of the books of the corporation, for dissolution of the corporation and settlement of its affairs, and that the defendants be enjoined from altering the status of the business of the corporation, the internal management of the corporation will not be interfered with by the court at the instance of a minority stockholder unless the majority stockholders are acting without the charter powers, or a strong case of mismanagement or fraud is shown. Bartow Lumber Co. v. Enwright, 131 Ga. 329 (62 S. E. 233). And see Civil Code (1910), Section 2224. No such facts are alleged in the petition as would authorize a court of equity to intervene in the instant case."
>
> Smith v. Albright-England Company et al., 171 Ga. 545 (3).

> "The internal management of a corporation will not be interfered with by the court, at the instance of a minority stockholder, unless the majority stockholders are acting without the charter powers, or a strong case of mismanagement, or fraud, is shown."
>
> Bartow Lumber Company et al. v. Enwright, 131 Ga. 329 (1).

These two cases are typical of those decided by the Supreme Court of Georgia, construing those sections of the Code which are now 22-710 and 22-711.

The trial Judge, in his Seventeenth Conclusion of Law, held that the delay on the part of the plaintiff in instituting his suit as to the transactions complained of prior to 1943, was unreasonable, and he is barred as to those transactions on account of laches. (He had already held that the method of handling the 1943 transactions benefited the Company to the extent of approximately $30,000.00. Finding of Fact 69.)

The Judge might well have concluded further that as to acts prior to 1943, the plaintiff was estopped by reason of the fact that the evidence indisputably showed that every such act complained of had either been participated in, acquiesced in, or ratified by him or his agent, Joel Hurt, Jr. The facts show such participation or acquiescence or ratification. The law is thus stated by the Supreme Court of Georgia in the case of Matthews v. Fort Valley Cotton Mills, 179 Ga. 580, 587:

> "Stockholders in a corporation who participate in the performance of an act, or acquiesce in and ratify the same, are estopped to complain thereof in equity."

The trial Judge's finding of laches is supported by the applicable law of the State of Georgia.

In the case of Winter et al. v. Southern Securities Company, 155 Ga., page 590, the Court, after holding that a stockholder has a right to inspect the books of the Company where the examination is asked in good faith and for an honest purpose, then held:

> "The petitioning minority stockholders having the right to inspect the books and records, including the minutes of the directors' meetings, for the purposes and under the circumstances named in the preceding headnote, and none of the acts of the officers and directors complained of having been committed since June, 1910, and the petition in the case having been

filed in the year 1922, the court properly sustained that ground of the demurrer based on laches. The delay on the part of the petitioners for such length of time was unreasonable."

H. N. 2, Winter v. Southern Securities Co., 155 Ga., page 591.

At page 602 of the opinion, the Court said:

"The petitioners having the right to inspect the books and records of the Securities Company, had at least constructive notice, and accordingly, as matter of law, were charged with notice from June 6, 1910, but took no action until the filing of this petition in 1922. It has been held by this court: 'The general rule is, that while a minority of the stockholders of a corporation may maintain a bill in equity in behalf of themselves and other stockholders for fraud, conspiracy, or acts ultra vires, against a corporation, its officers, and others who participate therein, when the minority stockholders have been injured or damaged by such acts, they must act promptly. If they postpone their complaint for an unreasonable time, they forfeit their right to equitable relief.'"

Winter v. Southern Securities Company, 155 Ga. 602.

We also call attention to the case of Baker et al. v. Spokane Savings Bank et al., 71 Fed. (2d) 487, a decision of the Circuit Court of Appeals for the Ninth Circuit, decided June 4, 1934. In this case it is not shown the exact time that the suit of the stockholders was filed, but from the date of the decision of the case, it is apparent that such suit was certainly filed within five years of the alleged fraudulent act.

At pages 492-3 of the opinion, the Court said:

"It is claimed that the doctrine of laches is not applicable to the transactions between the society and the bank for the reason that the transactions

complained of were ultra vires, because the 'acts of the directors in attempting to convert all the assets of the Society to the Bank were unauthorized, void, and of no effect.' This contention is predicated upon the proposition that as the assets of a profitable and going corporation cannot be transferred without the consent of all the stockholders of the corporation, a mere lapse of time would not validate such unlawful and unauthorized acts. This view is erroneous. Laches is a defense to the action of a minority stockholder or shareholder to set aside corporate acts whether fraudulent or ultra vires."

The Court then cites the Georgia case of Winter v. Southern Securities Company, supra, in support of this holding on this question.

Furthermore, in the case of Rigdon v. Barfield, 194 Ga. 77, and particularly at page 82 of that opinion, the question of the effect of allegations of fraud upon the running of the statute of limitations is considered. It was there said:

"No reason is asserted why the fraud was not earlier known to the grantee, or why he could not have promptly ascertained the facts. So far as appears, he made no effort during eleven years and more to find out how much land was actually included in the deed. Under these circumstances, the bar of the statute is not tolled merely because he was in ignorance of the facts until about ninety days before the suit was brought. A person can not thus sit quietly by for a length of time exceeding that named in the statute of limitations, and avoid its operation and save his cause of action by the mere allegation that he made the discovery only within the last ninety days. The law exacts from him a reason for his delay, that it may judge of its soundness. Silence on this subject is fatal, when the statute is pleaded as here. Marler v. Simmons, 81 Ga. 611 (8 S. E. 190); Crawford v. Crawford, 134 Ga. 114, 121 (67 S. E. 673;

> 28 L. R. A. [N. S.] 353; 19 Ann. Cas. 932). The conclusion is that the bar of the statute is unaffected by complainant's reference to time of the discovery of the shortage."
>
> Rigdon v. Barfield, 194 Ga. 77, at page 82.

The cases which we have just cited were cited to the Circuit Court of Appeals at pages 194-198 of our brief there.

In the Specification of Errors (Petition for Certiorari, page 19), it is asserted: first: that the Circuit Court of Appeals erred in "holding without reference to Georgia law and prior thereto, that none of the transactions hereinabove set out were illegal, done in fraud of the Company, or otherwise exceptionable."

We have demonstrated that the Circuit Court of Appeals used the Georgia statute as a yardstick, as the District Judge had done, and by that yardstick measured the facts as found by the District Judge.

Then the petition asserts that the Circuit Court of Appeals erred "in holding, without reference to Georgia law and contrary thereto, that ambiguous and equivocal disclosures to the injured stockholders barred recovery in the Company's behalf for the said transactions."

We have shown by a review of the Findings of Fact that the "disclosures" were not "ambiguous and equivocal", but that the petitioner or his agent had **"actual knowledge of these transactions as they developed"**.

CASE NO. 316.

It is asserted at page 19 of the petition for certiorari that in Case No. 316, the Circuit Court of Appeals erred as follows:

"(A) In holding that the petitioner had abandoned his appeal therein.

"(B) In affirming dismissal on the ground that the stock, in right of which petitioner sues, was acquired by him after the occurrence of the things he complains of."

At page 27 of the petition for certiorari, it is stated:

"There was no justification, therefore, for the holding that 'appellant has abandoned here his appeal from the judgment in Cause No. 316'."

This petition is submitted by Murray C. Bernays, Esquire, as counsel. Mr. Bernays was not counsel, nor of counsel when the case was argued in the Circuit Court of Appeals. He probably did not know when he prepared this petition for certiorari that counsel who argued the case for the now petitioner, in the Court below (Mr. John L. Westmoreland) made the statement in his oral argument before the Court, that Cause No. 316 had served its purpose.

We apprehend that that was the "justification" for the Court's treatment of Cause No. 316.

CONCLUSION.

This is simply a case in which a preferred stockholder brought a derivative action against the corporation and certain of its officers and directors, alleging various wrongs. The evidence failed to support the allegations of the petition.

"Viewed piecemeal or as a whole then, the record furnishes no support for the charges of fraud and overreaching with which the petition so plentifully abounds."

Circuit Court of Appeals Decision, 159 Fed. (2), 52, 59.

"It is sufficient to refer to the rule which declares that the findings of the District Judge must stand, unless clearly erroneous, and to say that except as hereafter mentioned, the evidence fully supports the findings."

Circuit Court of Appeals Decision, 159 Federal (2), at page 56.

We respectfully submit that the petition for certiorari should be denied.

CHARLES J. BLOCH,
614-18 Persons Building,
Macon, Georgia,
Counsel for Respondents, Cotton States Fertilizer Company, C. B. Clay, and W. J. O'Shaughnessey.

ELLSWORTH HALL, JR.,
of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1946

No. 1239

S. L. HURT,

Petitioner

versus

COTTON STATES FERTILIZER COMPANY, *et. al.*,
(District Court No. 301)

Respondents

S. L. HURT,

Petitioner

versus

COTTON STATES FERTILIZER COMPANY, *et. al.*,
(District Court No. 316)

Respondents

S. L. HURT,

Petitioner

versus

FRAMPTON E. ELLIS, as Administrator de Bonis Non Cum Testamento Annexo of the Estate of Joel Hurt, Sr., Deceased, *et. al.*,

Respondents

(District Court No. 324)

RESPONSE OF THE RESPONDENTS IN DISTRICT COURT CASE NO. 324 TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEO. P. WHITMAN
Attorney For Named Respondents.

CASES CITED

STATUTES CITED

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versus

FRAMPTON E. ELLIS, as Administrator de Bonis Non Cum Testamento Annexo of the Estate of Joel Hurt, Sr., Deceased, *et. al.*,

Respondents

(District Court No. 324)

RESPONSE OF FRAMPTON E. ELLIS AS ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF THE ESTATE OF JOEL HURT, SR., DECEASED, AND MRS. WILLIE MARTIN HURT, DISTRICT COURT CASE NO. 324.

The nature and object of this case cannot better be succinctly stated than as set forth in the opinion of the Circuit Court of Appeals (159 F. 2d. 52, 55, R. 2591, v. V). S. L. Hurt, petitioner for writ of certiorari, states (page 2 of petition) that the suit was against him, and for the determination, *inter alia*, that Willie Martin Hurt is a creditor of the estate in question "to such an amount that petitioner has no equity in the said shares (of preferred stock) and is, therefore, without status to sue." Case No. 324 was not against S. L. Hurt alone, but was also against Virginia L. Hurt and Cotton States Fertilizer Company, as indicated in the opinion of the Court of Appeals; nor did it seek the determination of the question of the right of S. L. Hurt to sue in Case No. 301, or otherwise, in respect to the subject-matter of that case, which was a stockholders' derivative action relating to the affairs of Cotton States Fertilizer Company. Plaintiffs in Case No. 324, respondents here, were not parties to Cases Nos. 301 or 316.

At page 7 of the petition for writ of certiorari it is stated: "Thereupon, on December 10, 1943, the *petitioner* (S. L. Hurt) bought the 495.1 shares of preferred stock from the estate *****. **** On April 20, 1944 the petitioner made demand upon Cotton States to transfer the 495.1 shares of preferred stock *into his own name* as record owner, but Cotton States refused." As a matter of fact, the alleged sale of the stock was by Joel Hurt, Jr., as executor of the estate to his wife, Mrs. Joel Hurt, Jr. (Virginia Lipscomb Hurt) and to his brother, S. L. Hurt (R. 164, v. I; R. 2, v. I), and not to S. L. Hurt alone; and the demand for the transfer of the stock was that it be transferred to S. L. Hurt and Virginia Lipscomb Hurt (R. 75, 76, v. I). The alleged sale was set aside by the District Judge as fraudulent and void; the judgment of the District Court was affirmed by the Circuit Court of Appeals, and no complaint of the judgment in that respect is made here. Case No. 324 thus accomplished its object; that of having the stock placed back where it belongs, in the Estate of Joel Hurt, Sr., deceased, as an asset for proper administration by the present personal representative of the estate, Frampton E. Ellis, as administrator de bonis non cum testamento annexo of said estate (159 F. 2d. 52, 56, 60; R. 2600, v. V).

The petition for writ of certiorari as to Case No. 324 presents the single question (pp. 4, 5):

"3. Whether, in such suit (a diversity jurisdiction suit), the Federal Courts in Georgia were free to decide without reference to Georgia law that a financial agreement between husband and wife, residents of Georgia, by virtue of which the wife, who did not want a divorce, took such steps and proceedings that she got one, is valid, and that the executory portion of such agreement is enforcible?"

The specification of error raises the same legal question (pp. 19, 28).

The argument of petitioner appears to be predicated on what he claims are three controlling facts, two of which he says are not open to dispute, and the other of which he says is an inference compellingly required by the first two. The argument is in the nature of a syllogism. It is respectfully insisted by respondents that the premises are incorrect and not supported by the record, and that the conclusion is erroneous and unsound.

The District Court found as a matter of fact that the guaranty of Joel Hurt, Sr. was not given for the purpose of facilitating a divorce and that the alimony agreement and said guaranty was not entered into in contemplation of a divorce. (R. 2539, v. V). The Circuit Court of Appeals, in its opinion and judgment of affirmance, said in respect of this finding: "As to No. 324, appellants attack the findings and judgment upon the ground **** (2) that Mrs. Willie Martin Hurt was a creditor of the estate. *** The second (attack) is based mainly on the position that the claim of Mrs. Hurt to a debt is based upon an illegal agreement because made to promote the procurement of a divorce." (159 F. 2d. 52, 56; R. 2593, v. V). *** "As to Mrs. Hurt's claim against the estate, we think it quite clear that the record supports the finding of the District Judge that she had a substantial claim against the estate *which is valid* (underscoring ours) and unpaid for an amount considerably in excess of the present value of the certificate (of stock) in controversy (159 F. 2d. 52, 60; R. 2601, v. V.) The judgment of the Circuit Court of Appeals was rendered on January 3, 1947. The petitioner here filed in that Court on January 21, 1947, petition for rehearing, claiming, inter alia, that "In Case No. 324, the Court overlooked and failed to consider that the record of the divorce proceedings filed in evidence in this case shows conclusively that the Guar-

anty (upon which Mrs. Willie Martin Hurt bases her claim to be a creditor of the estate of Joel Hurt, Sr., deceased), was given for the purpose of facilitating and promoting a divorce, and therefore void ab initio, under the universal rule of law laid down in 17 Am. Juris., page 156, Sec. 14 and approved in Georgia, in the case of *Birch vs. Anthony*, 109 Ga. 349, 34 S.E. 561, 77 Am. St. Rep. 379, which holds that any agreement even 'intended' or 'calculated' to facilitate the obtaining of a divorce is absolutely void." The Circuit Court of Appeals denied the motion for rehearing on January 31, 1947 (R. 2611, v. V).

The same question thus passed on, reviewed and re-reviewed, is now here.

On December 13, 1921 Geo. F. Hurt filed suit for divorce against his wife, Willie Martin Hurt, on the ground of cruel treatment. To this suit Mrs. Hurt on December 19, 1921, filed her answer and cross-bill for divorce, seeking therein a divorce and temporary and permanent alimony for the support of herself and children and the allowance of counsel fees. She filed an amendment to said answer and cross-bill on January 12, 1922. R. 2517, et. se. v. V). Thereafter by alimony agreement signed by Mr. and Mrs. Hurt, bearing date October 28, 1922, and guaranty agreement signed by Joel Hurt, Sr. bearing date November 2, 1922, which instruments constituted a single transaction, the matter of alimony and counsel fees was settled between the parties. The alimony agreement and guaranty are set forth at pages 1523, et seq. of v. III of Record. According to the undisputed testimony of John M. Slaton (a former Governor of Georgia, R. 2149, v. V) who was the attorney at law for Mrs. Hurt, and as such represented her in negotiations which resulted in said agreement and guaranty, this document was prepared by one Clifford L. Anderson (since deceased), as the attorney at law for George F. Hurt (also since deceased), then the husband of Mrs. Hurt, and for Joel Hurt, Sr. (R. 2147 et. seq., 2154 v. V).

The alimony agreement recites that George F. Hurt was a resident of Fulton County, Georgia "but temporarily sojourning in the City of New York and State of New York." It recites that George F. Hurt and his wife were married November 2, 1898 "but they had been living in a state of separation for several years." It names their three children, Edmund W.

Hurt, who had reached his majority in April, 1922, and Sarah Bright Hurt and Joel Hurt, III., still minors. The agreement further recites that Mr. Hurt is indebted to Mrs. Hurt in the sum of Five Thousand ($5,000.00) Dollars, principal and interest, arising on a certain note made by him to her, and upon other obligations, and is also indebted to her and the children for certain monthly allowances "heretofore agreed to be made by him, which he has failed to pay;" and they "desire to adjust all financial matters between them and desire likewise to enter into an agreement providing for the support of Mrs. Hurt and the minor children in the future, the same to be in lieu of all right to alimony for her and their account."

By the agreement Mr. Hurt was obligated to pay Mrs. Hurt the Five Thousand ($5,000.00) Dollar item in payment of the obligations due by him to her; also to pay to her "all back allowances made for the support of herself and the two minor children amounting to Eight Thousand, Four Hundred Sixty ($8,460.00) Dollars" (which was based on allowances of Four Hundred Seventy ($470.00) Dollars per month), "heretofore agreed to be paid to Mrs. Hurt for herself and two minor children," giving credit for certain advances theretofore made to Mrs. Hurt by Mrs. Joel Hurt, Sr. amounting to Five Thousand, Nine Hundred Thirty ($5,930.00) Dollars, leaving a balance to be paid by Mr. Hurt to Mrs. Hurt of Two Thousand, Five Hundred Thirty ($2,530.00) Dollars. By the agreement Mr. Hurt also agreed to pay to his son, Edmund W. Hurt, who had arrived at his majority, One Thousand, Nine Hundred Sixty ($1,960.00) Dollars, representing arrearages at the rate of One Hundred Forty ($140.00) Dollars per month in allowances to him.

By the agreement Mr. Hurt was obligated to pay Mrs. Hurt Five Hundred ($500.00) Dollars per month beginning November 1, 1922, for the support of herself and her two minor children, subject to abatement to the extent of One Hundred Fifty ($150.00) Dollars per month in relation to each of the two children upon the happening of the events therein set forth in respect of said children; and completely as to Mrs. Hurt upon her death or earlier remarriage.

It is undisputed that Mrs. Hurt has never remarried. She so testified. R. 2256, v. V.

Paragraph seven (7) of the agreement is as follows: "This agreement is made upon the further consideration that the payment of the sums of money herein agreed to be paid by Mr. Hurt shall be guaranteed by Mr. Joel Hurt, Sr. and this paper shall not become effectual until such guaranty is made;" etc.

The guaranty by its language affords internal evidence that it was a part of the same transaction as the alimony agreement and made in connection therewith and as a part thereof even though it actually bears date five days thereafter. By the guaranty Joel Hurt guarantees the payment of all sums of money herein agreed to be paid by George F. Hurt to Mrs. Willie Martin Hurt promptly at the time stated in the foregoing agreement. The guaranty also provides that it is made "in consideration that the said Mrs. Willie Martin Hurt has entered into the foregoing agreement with my son, George F. Hurt." And, as stated above, by paragraph seven (7) thereof, the agreement between Mr. and Mrs. Hurt was made upon the further consideration that the payment of the sums of money therein agreed to be paid by Mr. Hurt should be guaranteed by Mr. Joel Hurt, Sr. and would not become effectual until such guaranty was made. The difference in the dates of the alimony agreement and the guaranty is doubtless explained by the fact that George F. Hurt was at the time in New York and the agreement had been sent there for his signature; R. 2404, 2405, v. V. That the alimony agreement and the guaranty were parts of a single transaction is supported by the testimony of Mr. Slaton. They constituted a single document and were delivered at the same time; there was no negotiation in respect of the matter at all between the parties between the dates October 28, 1922 and November 2, 1922. (R. 2158, 2159, v. V.)

It was contended by counsel for S. L. Hurt and Virginia L. Hurt in the District Court that the guaranty was void ab initio because it was given without a valid, legal and legitimate consideration, and because it was given under duress and threats of Mrs. Hurt exercised upon Joel Hurt, Sr. in his life time. R. 2128, v. V. The District Court in its finding of fact No. 9, above mentioned, found to the contrary of these contentions; in other words, the Court found that the guaranty was not executed by Joel Hurt, Sr. under duress and threats of Mrs. Hurt; that it was not given for the purpose of facilitating a

divorce and that the alimony agreement and guaranty were not entered into in contemplation of a divorce. R. 2539, v. V. The question of the validity of the guaranty as procured by alleged threats and duress is not involved here. It was disposed of in the District Court and not thereafter urged.

It is respectfully submitted that this finding is fully supported, if not demanded, by the evidence. Mrs. Hurt's testimony is set forth at pages 2255 to 2269 and pages 2401 to 2410 of the record, volume V. She testified that the matter of the negotiation of the alimony agreement and guaranty was handled entirely by her attorneys, her father, the late Edmund W. Martin, and Mr. John M. Slaton, and that she personally had no contacts or communication with her husband, George F. Hurt, or with Mr. Joel Hurt, Sr. in relation thereto. She further testified that she never saw Mr. Hurt, Sr. nor Mrs. Joel Hurt, Sr. while the divorce suit was pending, with the exception that on one occasion during said period she went to the home of Mr. and Mrs. Joel Hurt, Sr., at the request of Mrs. Joel Hurt, Sr., at the time of a bereavement in the family. (R. 2258, 2259, 2260, 2261, 2264, 2268, 2403, 2040, v. V.). Mr. Slaton's testimony is set forth at pages 2147 to 2177 of the record, Volume V. In respect of Mrs. Willie Martin Hurt, he testified: "Mrs. Hurt was a great-granddaughter of Chief Justice Hiram Warner, and her Uncle was Chief Justice of the Supreme Court of Georgia, Hiram Warner Hill." (R. 2153, v. V). "I have known that lady all her life. She is gentle and kind, forgiving and indulgent. She had the high sense of honor and preservation of her own reputation." (R. 2172, v. V). He further testified, as did Mrs. Hurt, that he personally and professionally advised Mrs. Hurt that she should not see or have any dealings or associations with members of the family or Mr. and Mrs. Joel Hurt, Sr. pending the divorce proceedings. (R. 2159, 2160, v. V). In respect of the question or divorce and removal of disabilities, Mrs. Hurt testified that she never at any time discussed with her husband the question of a divorce nor agree that her husband might secure a divorce from her; nor did she have any discussion about such matter with her husband's father, Mr. Joel Hurt, Sr.; that she never discussed with either of them the question of removal of disabilities. (R. 2261, v. V). Mr. Slaton testified that he did not make any agreement on behalf of Mrs. Willie Martin Hurt, or even intimate or suggest any agreement on her behalf, that her

husband, Mr. George F. Hurt, should have a divorce by consent; that in the representation of Mrs. Hurt he did not ask or have an agreement with Mr. Clifford L. Anderson (the attorney for George F. Hurt and Joel Hurt, Sr.), or with any one else under the terms of which it was understood or agreed that Mrs. Hurt should have a divorce; that it was a matter to be submitted to the Court and to the jury, and "there was no thought of that sort;" that there was no agreement that the divorce proceeding on behalf of Mrs. Hurt was to be undefended; that there was no agreement by him, Mr. Slaton, or by his law firm, or any one else on behalf of Mrs. Willie Martin Hurt, that Mr. George F. Hurt should not defend against Mrs. Hurt's cross-bill based on desertion; that with respect to the matter of the removal of disabilities, that is entirely a matter for the jury. (R. 2154, 2155, 2156, 2162, 2175, v. V).

It is respectfully submitted that the testimony of Mrs. Hurt and Mr. Slaton shows conclusively that the divorce granted to Mrs. Hurt was without collusion or consent and was legally obtained. Indeed, the divorce granted to Mrs. Hurt was not and is not attacked. The then counsel for petitioner here stated on the trial that it was not being attacked. (R. 2262, v. V). Mrs. Hurt had sufficient legal grounds for divorce, and even though she had not thought about divorce before she was sued by her husband for divorce on unfounded charges against her, she did thereafter desire a divorce, and, as stated, had legal grounds for proceedings to that end. And this brings us to the statement of petitioner here in his petition for writ of certiorari, that "Mrs. Willie Martin Hurt did not want a divorce," and claimed by petitioner to be a controlling fact, not open to dispute. Petition for writ, page 28. See also pages 4 and 18. Petitioner appears to base this statement on the Record, page 2262, v. V. This does not appear to be a correct interpretation of the record. Mrs. Willie Martin Hurt did not testify that she did not want a divorce. The first question asked her on cross-examination by Mr. Durant, counsel for S. L. Hurt and Virginia L. Hurt in the District Court, was: "Q. Mrs. Hurt, you did not particularly want a divorce yourself, did you? A. Well, I hadn't thought about it, Mr. Durant." (R. 2262, v. V). It will be noted that this question did not relate itself to any particular time. Then follow in the record certain statements by counsel for plaintiffs in that

Court (respondents here), the District Judge, and counsel for said S. L. Hurt and Virginia L. Hurt, and among other things the Court asked of counsel for said Hurts the question and received the answer following: "The Court: What was it you asked her? Mr. Durant: I stated, you did not particularly want a divorce, and she said no, I never even thought of it." This answer purporting to state what Mrs. Hurt had testified is not the language of the record as to her testimony, introducing as it did the word "no," a word Mrs. Willie Martin Hurt did not use. This testimony was given on the afternoon of May 8, 1945 (R. 2251, v. V). Two days thereafter (R. 2378, v. V), when Mrs. Hurt was recalled as a witness, she testified further in respect of this matter, at which time counsel for her and Ellis, as administrator (counsel for them as respondents here) undertook to have the witness clarify the statement previously made by her in order to relate it to the time she had in mind in making it; and it must be confessed that said counsel, after two days had elapsed, was faulty in his recollection as to what her previous answer had been insofar as the use of the word "no" was concerned and thus used it in his introductory statement, as a word of recollection only, to the question he propounded. In answer to the question as to the time to which her previous statement related, she then testified: "I never knew there was any reason for getting a divorce or that anybody was contemplating a divorce. Yes, I wanted a divorce after he brought a suit against me. Anybody that has any self-respect would have wanted one with that." (R. 2409, 2410, v. V). This attitude on the part of Mrs. Hurt, after her husband had brought the divorce suit against her, is supported by the testimony of Mr. Slaton. (R. 2153-2156, v. V).

Thus, the first premise, or so-called controlling fact, on which petitioner seeks writ of certiorari, falls.

The second alleged controlling fact, "that she (Mrs. Hurt) and her husband were at an impasse which threatened to make it impossible for him to get divorced," is not a statement of fact, but a mere conclusion; and there is nothing in the alimony agreement or guaranty which required or requires a holding that they were invalid.

Mrs. Hurt did not seek or require her husband's consent to her securing a divorce. Nor did she consent to the removal

of his disabilities or have any agreement in relation thereto. That was a matter which could be determined only by the jury on the rendition of the final verdict in her case, and that only in case of the grant of a divorce to her (Code of Georgia, Annotated, Section 30-122); and no verdict or judgment by default could have been taken or was taken in the proceeding by Mrs. Hurt for divorce. The allegations in support of her petition for divorce were established by evidence as required by law. (Code of Georgia Annotated, Section 30-113; R. 2404, 2414-2417, v. V).

In addition to the facts already mentioned, such as the conduct of negotiations exclusively between John M. Slaton and Edmund W. Martin (father of Mrs. Willie Martin Hurt, since deceased), the attorneys for Mrs. Hurt, and Clifford L. Anderson (also since deceased), the attorney for George F. Hurt and Joel Hurt, Sr., and the entire absence of an consent or collusion in respect of the securing of a divorce by Mrs. Hurt and in respect of the removal of disabilities as to Mr. George F. Hurt, and the entire absence of any understanding or agreement in relation to such matters, attention is also called to other facts in the record, — facts which are a matter of written record, which support the inescapable conclusion that the contention of petitioner here as to the invalidity of the guaranty is entirely without merit.

For example, the alimony agreement bears date October 28, 1922 and the guaranty November 2, 1922, but both parts of a single and contemporaneous transaction, as above indicated. The will of Mr. Joel Hurt, Sr. was executed on October 4, 1922 (R. 2110, 2118, v. V), some months after December 13, 1921, when the divorce suit of George F. Hurt against Willie Martin Hurt was filed (R. 2519, v. V), and while said suit was pending. By this will he bequeathed to Mrs. Willie Martin Hurt Forty (40) shares of the Capital Stock of the Continental Trust Company, and he also bequeathed one-half of one-sixth of the net income from the residue of his estate to his three grandchildren, the children of his son, George F. Hurt, and his wife, Mrs. Willie Martin Hurt.

By a codicil to that will executed by Mr. Joel Hurt, Sr. under date of August 15, 1924 (R. 2119, v. V), Mr. Hurt, Sr. not only did not change his original will, insofar as the bequest to Mrs. Willie Martin Hurt and her children were concerned, but

he revoked Item Ten (10) of his original will and substituted a provision in lieu thereof which evidently had reference to the guaranty in question, for in lieu of the word "assumed" in Item Ten (10) of his original will, he used in the substituted provision the words "assumed or guaranteed the payment of," etc.

The testator also made another codicil to his will under date of November 28, 1924 (R. 235, V. I), and by this codicil he made no change whatever in respect of the bequest to Mrs. Willie Martin Hurt and her children. Mr. Hurt died on January 9, 1926 and his will and codicil were probated in solemn form on April 23, 1926. R. 237, v. I.

The conduct of Mr. Joel Hurt, Jr. as an officer of the Continental Trust Company, one of the executors of his father's will, and of himself as one of the individual executors, also is a complete refutation of the contentions made for the first time, after a period of some twenty years had elapsed since the alimony agreement and guaranty were executed. Joel Hurt, Jr. testified that he knew of the existence of the alimony agreement and guaranty; that a duplicate or triplicate original thereof came into the possession of the executors and that he knew of the existence of the agreement and guaranty all through the intervening years, and remembered it when he claims to have disposed of the Certificate No. 5 of the Preferred Stock of the Cotton States Fertilizer Company on December 10, 1943. (R. 2201-2203, 2223, v. V).

The alimony agreement and guaranty were recognized as valid obligations by the Federal Estate Income Tax Return verified by the executors of the estate, including Joel Hurt, Jr., sworn to on February 23, 1927. Paragraphs 4, 4(a), 4(b) and 4(c) of the alimony agreement and the entire guaranty were set forth as Exhibits to Schedule "I" and in that Schedule the liability under the guaranty was estimated to be Forty-five Thousand ($45,000.00) Dollars. R. 2446, 2459-2463, v. V).

The alimony agreement and guaranty were also recognized by the original executors of the estate and also by S. L. Hurt, the petitioner here, by agreement of date June 19, 1926, and also by Suit No. 71193 in the Superior Court of Fulton County, Georgia, and the decrees therein (R. 2530, 2480, v. V), to

which agreement and suit they and Mrs. Willie Martin Hurt, and others, were parties.

Joel Hurt, Jr., former executor, recognized the obligation of the estate to Mrs. Willie Martin Hurt under the alimony agreement and guaranty by his letter, in evidence, of date June 21, 1935 to Mr. John M. Slaton. (R. 2105-2108, v. V).

Even if admissions both expressly and by silence and inaction are not technical estoppels, they are evidence and highly persuasive evidence against the belated suggestion of alleged invalidity of the alimony agreement and guaranty. Suit No. 71193 in Fulton Superior Court, and the decrees therein, are more than mere admissions; they are undoubtedly conclusive.

It is undisputed that George F. Hurt and his wife, Mrs. Willie Martin Hurt, had been living in a bona fide state of separation for a number of years before the divorce suit was brought. Mrs. Hurt so testified and that fact is confirmed by other testimony in the record. This fact also appears from the alimony agreement itself. It also appears from the testimony by deposition of Mrs. Hurt on which divorce was granted to her on the ground of desertion. She testified on the trial of this case and by depositions in the divorce case that her husband had deserted her against her consent for more than the legal period of three years.

While it is true that a contract between husband and wife made with the intention of promoting a dissolution of the marriage relation is contrary to public policy and void, a contract providing for the wife's maintenance, made after separation has taken place, is valid and enforceable.

Sumner vs. Sumner, 121 Ga. 1 (3), 5.

To the same effect, see *Watson vs. Burnley*, 150 Ga. 460, s. c. 25 Ga. Apps. 779 (involving suit against surety of such a contract);

Craig vs. Craig, 53 Ga. Apps. 632 (involving agreement for support of wife and minor child);

Wallace vs. Wallace, 61 Ga. Apps. 789 (involving agreement for support of wife during the pendency of the husband's divorce action against her):

Hayes vs. Hayes, 65 Ga. Aps. 222.

"Where a husband and wife were living in a state of separation and the wife was suing the husband for divorce and alimony, they could enter into a valid and enforceable contract settling the issue as to alimony."

Brown vs. Farkas, 195 Ga. 653.

In the case at bar the agreement was made not only for the support of Mrs. Hurt, but also of the two minor children, Sarah Bright Hurt and Joel Hurt, III. The law contemplates that such agreements may be made and that they are valid, binding and enforceable. Code of Georgia Annotated, Section 30-211.

In *Hayes vs. Hayes, supra*, the Court held (Headnote 1): "Where a husband and wife are living in a bona fide state of separation, a valid and binding agreement may be entered into between them by which the husband agrees to pay the wife stated monthly sums for her support, which she agrees to accept in settlement of 'all alimony, temporary or permanent, counsel fees, or interest that she has or may have in his estate, and any and all other claims that she has or may have against' the husband or his estate, where it is provided that such payments shall cease upon the marriage of the wife; and where the parties are subsequently divorced and there is no claim made in the divorce suit for alimony, and no mention is made of alimony in the final decree, the decree is not a bar to the right of the wife to the monthly payments provided for in the agreement."

In the Hayes case the contract released and discharged the husband "from any and all liability for her, wife's support, and for alimony, temporary or permanent, attorney's fees, in any action that might be brought either against or by the husband," but it did not provide that the parties would be divorced. Neither is it so provided in the alimony agreement in the case at bar, and the attorney's fee in the case at bar was payable regardless of the outcome of the divorce proceedings.

There was no legal inhibition preventing Mrs. Hurt from filing an amendment to her divorce suit adding the additional ground for desertion.

Zachry vs. Zachry, 141 Ga. 404 (amendment adding ground of cruel treatment to ground of desertion);

Phinizy vs. Phinizy, 154 Ga. 199 (amendment adding ground of cruel treatment to ground of desertion);

Newton vs. Newton, 196 Ga. 522 (amendment adding ground of adultry to ground of desertion.)

The case at bar is clearly distinguishable from the case of *Birch v. Anthony*, 109 Ga. 349, and similar cases cited by counsel for petitioner, wherein the alimony agreement expressly provided for the granting of a divorce or was conditioned upon or made express provision for consent thereto.

Thus in *Birch vs Anthony, supra*, the agreement contained the express condition: "Providing this is a divorce granted said Anthony by 1st of April, 1895;" the contract thereby providing, in effect, that it should be legal if a divorce should be granted to the husband on or before a fixed date. In *Ozmore vs. Ozmore*, 179 Ga. 339, the agreement provided, among other things: "The wife is to file suit for divorce against the husband, *which he agrees not to contest* and the husband agrees to pay counsel fees and costs in said case." In *Law vs. Law*, 186 Ga. 113, the agreement provided that either party "may at any time bring his or her action for divorce, and *the same will not be contested;* provided the proceeding is based upon some other lawful ground than that which will involve the character or chastity of either party to this agreement." In the case at bar there was no provision of this sort in the alimony agreement. The obligation to pay monthly installments provided for in Paragraph 4 of the alimony agreement (R. 1525, V. III) was in no way conditioned upon the outcome of any divorce proceedings; and the obligation in respect of payment of attorney's fees (paragraph 6 of the agreement) was not conditioned upon the termination of the divorce suit in any particular manner or upon any particular outcome thereof.

It is, therefore, respectfully submitted that the District Court's finding of fact No. 9, affirmed by the Circuit Court of Appeals, was and is correct. It is not clearly erroneous, but finds substantial support in the evidence, if, indeed, it is not demanded thereby. The applicable Georgia law was applied by the Court to the facts as they were actually and properly found by the Court.

The question here is not a question of law, based on undisputed facts, except as such facts, it may be fairly contended,

demanded the finding by the District Court; but rather, at most, a question of fact, in respect of which the District Court's finding must stand unless clearly erroneous; and the application of Georgia law to such fact, and not to an entirely different fact or facts. 159 F. 2d. 52, 56; Rule 52 (a) of the Rules of Civil Procedure for the District Courts of the United States. (28 U.S.C.A. foll. sec. 723 c, page 667).

The concluding statement of petitioner in his petition for writ of certiorari that "we do not go into the question whether Mr. Ellis was in the proper discharge of his duty as administrator," etc., is not pertinent here; and even if it were, it is apparently based on an erroneous view and unsound. Ellis was not a party to Case No. 301. He, as administrator, brought Suit No. 324 to set aside an alleged fradulent transfer of stock by the former executor, who had been removed at the instance of Mrs. Willie Martin Hurt, a creditor of the estate, to S. L. Hurt, the petitioner here, and Virginia Lipscomb Hurt, brother and wife respectively of the former executor. Mrs. Willie Martin Hurt joined as plaintiff in Suit No. 324, as at least a proper party. The District Court found that both Ellis as administrator, and Mrs. Willie Martin Hurt, had a right to bring this suit. R. 2547, v. V. S. L. Hurt as co-plaintiff with Virginia Lipscomb Hurt in Suit No. 301, and later as plaintiff alone (the case having after its institution been dismissed as to Virginia Lipscomb Hurt, R. 207, v. I), did not undertake to represent the estate in that case. He was relying on his claimed ownership of the stock as an alleged purchaser jointly with his sister-in-law from his brother at a time when the later was executor of the estate and before his removal; and without conceding the invalidity of the purchase, he also claimed to be the owner of an equitable interest in the stock as estate stock. He was proceeding in Case No. 301 in his own interest. He never contested the claim of Mrs. Willie Martin Hurt as a creditor until it came into conflict with his own personal interest, and that is the case now. The transfer of the stock to him and his sister-in-law was adjudicated as fradulent and void, and the stock is now back in the estate, where it belongs, as above indicated, to be administered by Ellis, as administrator. The greater the value the stock has or may have, as the result of Case No. 301 or otherwise, the larger the amount that will be available for the payment of the estate's indebtedness to Mrs.

Willie Martin Hurt, which is increasing monthly; and the brighter the prospect of S. L. Hurt, as an owner of an equitable interest therein as estate stock, to realize therefrom, subject to the payment of estate indebtedness.

It is respectfully submitted that the petition for certiorari should be denied.

GEO. P. WHITMAN,
Counsel for Respondents,

Frampton E. Ellis, as administrator de bonis non cum testamento annexo of the Estate of Joel Hurt, Sr., Deceased, et. al., and Mrs. Willie Martin Hurt.

219 HURT BUILDING
ATLANTA, GEORGIA

APPENDIX

CODE OF GEORGIA ANNOTATED.

Sec. 30-113. No verdict or judgment by default shall be taken in a suit for divorce, but the allegations in the petition shall be established by evidence before both juries.

Sec. 30-122. When a divorce shall be granted, the jury rendering the final verdict shall determine the rights and disabilities of the parties, subject to the revision of the court.

Sec. 30-211. In either of the latter two cases the husband may voluntarily, by deed, make an adequate provision for the support and maintenance of his wife, consistent with his means and her former circumstances, which shall be a bar to her right to permanent alimony.